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prepared for the Department of Consumer and Corporate Affairs
The Honourable André Ouellet, Minister

PROPOSED POLICY DIRECTIONS FOR THE REFORM OF THE REGULATION OF UNFAIR TRADE PRACTICES IN CANADA

Volume II

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BY

MISLEADING ADVERTISING DIVISION
BUREAU OF COMPETITION POLICY
DEPARTMENT OF CONSUMER AND CORPORATE AFFAIRS

August, 1975.

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Appendix A.

COMPARISON BETWEEN THE MISLEADING ADVERTISING PROVISIONS OF THE COMBINES INVESTIGATION ACT AND CERTAIN RELATED PROVINCIAL STATUTES*

History of government control of deceptive trade practices commenced in 1917 when the predecessor to what is now section 37 of the Combines Investigation Act was introduced into the Criminal Code. The responsibility for the enforcement of that section was in the hands of the Provincial Attorneys General. Lack of enforcement led to incorporating this general prohibition against misleading advertising into the Combines Investigation Act (1969) in order that a centralized agency would undertake nationwide enforcement of the section. Section 36 of the Act, a prohibition against misleading price advertising, has been part of the misleading advertising provisions under the Act since 1960.

Although, some provincial Consumer Protection Acts have attempted to control some market/advertising abuses, it was not until 1974 that two provinces, Ontario and British Columbia, passed comprehensive unfair trade practices acts covering a wide variety of unfair and unconscionable practices prevalent in the Canadian retail market. Alberta passed similar legislation in 1975, although somewhat different in format. It appears that other provinces are considering the advisability of introducing similar legislation.

In contrast to the federal general prohibitory approach as contained in the Combines Investigation Act**, the provincial statutes detail specific instances of abusive practices. This reflects the different constitutional basis - the federal legislation falling under the criminal law

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*This comparison concerns only the following provincial statutes and does not extend to such Acts as The Trade Practices Inquiry Act RSM 1970 c.T110

The Business Practices Act SO 1974 c.131
The Trade Practices Act SBC 1974 c.96 (as amended)
The Unfair Trade Practices Act SA 1975 c.33

**Where the Federal Act is mentioned infra, it refers to the Combines Investigation Act RS, c.C-23, as amended by Bill C-2.

power and the provincial under the property and civil rights power. As in the U.S. Federal Trade Commission Act, a broad general prohibition against misleading advertising is the main enforcement vehicle in the Combines Investigation Act. This approach has proven remarkably effective with over 350 convictions registered since 1969.

Prohibition - The Three Provincial Statutes

Although the basic format of the general and specific prohibition is similar in all the provincial statutes, there are differences with respect to the categories of representations, conduct and practices prohibited and the approaches to prohibiting the same activity. Generally two basic categories of practices are distinguished - unfair or deceptive practices and unconscionable practices.

In prescribing deceptive (as distinct from unconscionable) practices, each provincial statute enacts a general definition to which there is appended a list of specific instances of offensive conduct, the inclusion of which does not detract from the generality of the legislation's terms.

Ontario's generalized prohibition refers simply to "false, misleading or deceptive" representations (s.2(a)) whereas the B.C. and Alberta statutes expressly encompass both representations which in fact deceive or mislead and those which have the capacity or tendency (B.C.-s.2(1)) or might reasonably have that effect (Alberta - s.4(1)(d)).

It should be noted that Ontario's general prohibition (s.2) is restricted to "representations" whereas B.C. (s.2) and Alberta (s.4) prohibit representations as well as acts, practices and conduct. Ontario and British Columbia specifically include non-disclosure.

The following is a list of the types of "unfair" practices prohibited under the three provincial statutes:

(a) misrepresentation as to sponsorship, approval, performance characteristics, accessories, uses, etc.

(b) misrepresentation as to supplier's sponsorship, approval, status, etc.

(c) misrepresentation as to standard, quality, grade, etc.

(d) misrepresentation as previous history of the goods.

(e) misrepresentation that the goods are new or used.

(f) misrepresentation as to the reason for availability of the goods.

(g) misrepresentation that the goods have been supplied in accordance with a previous representation.

(h) representation that the goods are available where the supplier has no intention of supplying the goods.

(i) a misrepresentation that a service part or repair is needed.

(j) misrepresentation concerning a specific price advantage.

(k) misrepresentation as to the purpose of a solicitation.

(l) misrepresentation as to the existence of rights, remedies or obligations.

(m) misrepresentation as to salesman's authority to negotiate final terms.

British Columbia and Alberta also prohibit:

(a) representations such that a consumer might reasonably conclude that goods are available in greater quantities than is the fact.

(b) quotations which turn out to be materially less than the final price charged.

(c) advertisements giving less prominence to the price of the transaction than to any part thereof.

Ontario and British Columbia prohibit representations containing innuendo or ambiguity as to material facts or the nondisclosure of a material fact, if the representation is deceptive or misleading.

Regulations

Ontario and British Columbia make provision for the prohibition of other acts or practices by means of regulation and in Ontario section 17(1)(b) provides that knowing contravention of a regulation is a summary conviction offence. British Columbia does not require such knowledge. Alberta provides for regulations prescribing information that must be part of a representation made by a supplier in respect of any consumer transaction (s.21(a)) and section 17(2) provides that breach of such a regulation amounts to a summary conviction offence.

Parties & Transactions - Definition

Ontario and British Columbia prohibitions against unfair practices refer specifically to "consumer transactions" or "consumer representations". Alberta uses the term "consumer transactions" in respect of "unconscionable practices" only (discussed below).

Both Alberta and British Columbia restrict the definition of "suppliers" to entrepreneurs and others engaged in a commercial undertaking, and the B.C. Act excludes "suppliers" from the class of persons designated as "consumers". While the Alberta statute's definition of "consumer" contains no similar qualification, it should be noted that the practical effect of its restrictive definition of "services" is to limit it largely to transactions involving private individual consumers. Both the Alberta and British Columbia definitions of "consumer" extend the term's ordinary meaning to include certain third party beneficiaries and the definition of "supplier" to encompass persons who may only be indirectly

involved in a consumer transaction in which no privity exists between themselves and the consumer. Ontario does not restrict the scope of the Act to transactions by a supplier in the course of his business.

The Federal Act prohibits representations made "to the public" if they are made for the purpose of promoting directly or indirectly any business interest.

All trade practices statutes extend to dealings in services as well as goods, though a substantial variation among the respective definitions of "services" exists. The Federal Act's scope is in this respect the widest since the "services" to which it applies includes services "of any description, whether industrial, trade, professional or otherwise". British Columbia's definition of "services" is in one dimension narrower than Alberta's or Ontario's in that it is limited to personal property - however, it is not restricted to services involving social, recreational or educational aspects. Ontario and Alberta's are so restricted but cover real property to a certain extent.

Unconscionable Practices

Several differences arise with respect to the treatment of unconscionable (as distinct from merely deceptive) practices. The Federal Act does not apply to unconscionable practices. Ontario defines unconscionable consumer transactions to be unfair practices, and in determining whether a representation is unconscionable recourse may be had to the knowledge of the representor regarding specifically enumerated factors. In British Columbia, a determination of unconscionability is made by the court after considering all the surrounding circumstances that the supplier knew or ought to have known including the same enumerated factors as for Ontario.

The Alberta Act conclusively deems the enumerated practices to be unconscionable rather than merely describing circumstances whose existence can potentially but need not prove grounds for finding that unconscionability exists. Furthermore, Alberta does not attach criminal sanctions to representations or conduct constituting either a deceptive or an unconscionable practice, but limits the aggrieved to a

civil remedy.

The provinces differ in their formulation of the factors, the existence of which leads to a finding of unconscionable dealing. However, all three provinces include the subjection of the consumer to undue pressure. In dealing with exploitation, Alberta and British Columbia require both the existence of a consumer disability to appreciate the nature of a transaction and that the supplier have taken advantage of that disability. Ontario merely requires that the consumer not have been reasonably able to protect his own interests. In Ontario and British Columbia, a transaction is unconscionable where the supplier knew that there existed a gross discrepancy between the price paid by a consumer and that at which the subject matter was available to like consumers, and where there was no reasonable probability of payment in full by the consumer. Ontario and British Columbia refer to transactions whose terms and conditions are so adverse as to be inequitable; no such reference appears in the Alberta statute. Ontario refers to transactions in which the consumer is substantially deprived of the benefit; in Alberta, it must be established that the supplier knew there was a defect in the goods or that all or part of the services in question could not be provided and that he knew the consumer was not aware of nor could reasonably have become aware of this fact.

British Columbia is the only province which provides for the prescription of other circumstances to be considered by the court in its determination of an unconscionable dealing (section 32(o)).

Prohibitions - The Combines Investigation Act

The scope of the misleading advertising provisions of the Federal Act has through prosecutions been proven to correspond to most of the enumerated "unfair" abuses found in the provincial legislation. The Federal Act does not, of course, cover the practices deemed unconscionable under the provincial statutes such as undue pressure. However, certain categories of conduct have not been caught by sections 36 and 37 of the Combines Investigation Act (i.e. as unamended), and this is explained largely by the fact that section 37 applies only to purported statements of fact appearing in advertisements, as distinct from misleading or deceptive representations.

However, section 36(1) as contained in Bill C-2 has been drafted with a view to avoiding this deficiency in the previous legislation. Apart from this, there are two major differences between the unfair trade practices provisions of the provincial acts and the Federal Act. The first is that whereas the Federal Act simply provides that both the general impression conveyed by a representation and its literal meaning shall be considered in determining whether it offends the Act, both Ontario and British Columbia have provided that the use of exaggeration, innuendo or ambiguity as to a material fact constitutes an offence if such use rendered the representation deceptive. A second distinction arises from a provision in the British Columbia and Alberta acts which deems it a deceptive practice if a supplier, without a consumer's express consent, proceeds with his performance of an agreement where the estimate or quotation for that performance which was provided the consumer proves substantially less than the price eventually demanded by the supplier. In the case of both performance claims and testimonial-like representations, it should be noted that the general prohibition against misleading representations contained in section 36(1)(a) of the Federal Act will almost always cover abusive conduct involving these practices. However, in addition, section 36(1)(b) of the Act renders it an offence if the performance claim is not based upon an adequate and proper test, whereas the parallel provincial provisions affect performance claims only insofar as they are untrue. The so-called "testimonial" section of the Act does not encompass representations as to the sponsorship, status, affiliation or connection of goods or services or of their supplier, whereas the corresponding provincial measures do, but such misrepresentation would be covered under section 36(1)(a).

There are also substantial differences in the treatment of non-availability. Under the federal measure (section 37) the price of the product advertised as available must be represented as being a "bargain price" before its non-availability in reasonable quantities offends the Act. The Act in addition creates a special defence applicable only to this section: it is a complete answer to a charge if an accused provides a "raincheck" and honours this undertaking within a reasonable time by furnishing, at the advertised price, the product or if notwithstanding his reasonable efforts to supply the product in reasonable quantities he

was unable to do so on account of unanticipated events beyond his control. Although it provides no defence and applies regardless of the unavailable product's price, the Ontario provision adopts a reasonability test; an offence occurs where an accused "knows or ought to know" that the goods or services will not be supplied. The British Columbia measure requires that the accused actually have no intention of furnishing the product, whereas the Alberta statute renders it sufficient if the supplier has no intention or no reasonable gounds for believing he has the capacity to supply the goods. Furthermore, the Alberta and British Columbia statutes contain additional provisions which deem to be deceptive practices, representations which might reasonably lead a consumer to believe that goods (goods or services in B.C.) are available in greater quantities than they in fact are; the B.C. statute provides that a prominently represented limitation upon availability will avoid the prohibition.

In dealing with price representations, the provinces address themselves to indications of non-existent price advantages or benefits. In their application, these sections are identical to the Federal Act's section 36(1)(d), save that the latter requires that the representation be materially misleading and extends to past and future, and not simply present, prices. In addition, the Federal measure specifically prohibits selling products at higher than advertised prices and selling a produce at any but the lowest of any price indicated thereon or in any in-store display or advertisement (section 36.2)

Offences & Penal Sanctions

Ontario and British Columbia both provide that engaging in an unfair and unconscionable practice is a summary conviction offence. The Ontario provision requires knowledge that the practice is unfair. Alberta has no such provision but the Director may commence an action against suppliers who engage in an unfair act or practice, and as discussed above, breach of a regulation requiring information disclosure, amounts to a summary conviction offence.

Exemptions

Publishers Exemption - This common exemption arises in the case of publishers who make a representation on behalf of another in the course of their business, though there are some differences in the breadth of the exemption.

The Ontario publishers exemption (s.17(b)) obtains unless the third party knows that the words or conduct constitute an unfair or deceptive practice. It creates an exemption from both criminal and civil liability but does not affect the availability of an order to cease and desist an unfair practice. The British Columbia Act expressly exempts the third party from civil and criminal liability provided he acted in the course of his business, that he "did not know and had no reason to suspect" that the publication would amount to an offence and that he recorded the name of the advertiser (Section 1A). The Alberta Act creates a similar exemption for publishers (employing the term "good faith") as well as for advertising agencies. This Act does not apply to domestic servants employed in a private dwelling and to casual employees. The federal publishers' exemption requires good faith, that the party have acted in the course of his business and have recorded the name and address of the advertiser. Further, the Federal provision contains a caveat restricting the exemption to situations in which the advertiser carries on the business or supplies the product to which the representation pertains in Canada.

Due Diligence

Ontario requires that an accused has known that the prohibited practice he commits was unlawful before he can be convicted of an offence. The Federal Act provides a defence in the case of conduct contrary to section 36 or which contravenes the testimonial section (s.36.1) except in the latter case where the accused was acting on behalf of a party outside Canada. The accused must establish all the following: error; reasonable precaution and the exercise of due diligence to prevent such an error; and immediate and reasonable measures to bring the error to the attention of those likely to have been reached by the prohibited representations. Under the British Columbia Act, the accused must establish that the offence occurred as the result of a

mistake, reliance upon another's information or some cause beyond his control, and that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

Civil Remedies (Available at the instance of consumers)

All statutes confer equitable and common law remedies upon the victims of prohibited trade practices.

Identity of Defendants

The Ontario Act expressly provides that the person who made the deceptive representation is jointly and severally liable with the person who entered the agreement (s.4(3)). However, an assignee's liability is expressly limited to the amount paid by the assignee under the agreement (s.4(4)). According to the B.C. definition of supplier (s.1), parties other than those who are privy to a contract may be joined as defendant suppliers. The Alberta definition of supplier is also an extended one, and specifically includes manufacturers, distributors, promoters as well as persons who become liable to sell and persons who receive or are entitled to receive all or part of the consideration paid or payable under a consumer transaction, whether as parties thereto or as assignees or otherwise, or who are otherwise entitled to be compensated by a consumer for goods or services or both (s.1(h)).

In Alberta, the combined effect of the definition of "supplier" and the enabling section allowing for consumer redress, is that the defendant to an action by a consumer must:

(a) fit within the definition of supplier, and

(b) have engaged in or acquiesced in the unfair act and practice.

The Federal legislation is framed simply with respect to the "persons" who engage in prohibited conduct. As is the case with the provincial legislation, no criminal conviction is required as a prerequisite to the civil cause of action, though the Act expressly provides that the record of criminal proceedings shall be proof, in the absence of evidence to the contrary that the prohibited practice on which the civil cause turns occurred.

The Ontario Act expressly requires that the aggrieved party has been induced into entering an agreement by an offensive consumer representation. Alberta and British Columbia simply provide that the consumer must have suffered the damage by reason of deceptive or unconscionable practices. The Federal Act provides that a person who has suffered loss or damages as a result of conduct amounting to an offence may sue for damages.

The aggrieved consumer in Ontario may rescind the agreement and recover damages, but if elected rescission must be exercised within six months of the agreement. Where rescission is precluded by the intervention of bona fide third party rights, the consumer is entitled to recover the difference between the amount paid under the agreement and the fair market value of the subject matter, damages, or both. Exemplary or punitive damages are available in the case of an unconscionable practice. The Alberta and British Columbia statutes provide for the award of damages (including punitive and exemplary), for making any order (including rescission or restitution and/ for the imposition of "such other terms as the court considers just" (s.20(1)). Under the Federal statute, the individual consumer is confined to damages.

Unenforceability

Section 3(3) of the British Columbia Act provides that consumer transaction involving an unconscionable practice are unenforceable at the instance of the supplier.

Injunctions

Only British Columbia and Alberta provide for relief by way of declaratory judgements and injunctions at the instance of a consumer. The British Columbia statute provides that a person may be a plaintiff to certain actions whether or not that person has a special or any interest under the Act or the regulations, or is affected by a consumer transaction. In such proceedings, the plaintiff may seek a declaration that an act or practice is unconscionable or deceptive or an interim or permanent injunction restraining the practice. Such declaration or injunction is conclusive evidence in any other proceedings that the act or practice is deceptive or unconscionable (section 21). In considering whether to award an interim injunction, section 17 reverses the normal criteria of the bal-

ance of convenience by requiring the court to attach greater weight to the protection of consumers. The applicant need not establish that irreparable harm will occur should the interim injunction be denied. Section 16(3) further provides that the court may restore to any person having an interest therein any money or property acquired by virtue of an unconscionable or deceptive act or practice.

Alberta provides, in the case of an interim injunction, that the courts must be satisfied that there are reasonable and probable grounds for believing that an immediate threat to the interests of persons dealing with the defendant supplier exists. Under the Alberta Act, as in British Columbia, the applicant need not prove irreparable harm, but he must however satisfy the court that a prima facia case exists. Neither the Ontario nor the Federal acts provide for injunctions and like remedies at the instance of the individual consumer. Section 29.1 of the Federal Act provides that the injunctive remedy is only available at the instance of the Attorney General.

Class Actions

British Columbia specifically provides for class actions by an individual consumer upon notice to the Director who may intervene as a party. Alberta limits this remedy to actions commenced by a consumer organization which is defined as a non-profit corporation promoting consumer interests. The organization need not have an interest in or be affected by the subject matter of the proceedings; the court may direct the posting of security for costs; and the available remedies are confined to an injunction and a declaration. The Ontario statute and the Federal Act do not make any provision for class actions.

Civil Remedies (Available at the instance of public officials) and Administrative and Judicial Powers and Procedure

Under the British Columbia Act the Director may commence an action under section 16 and while damages may not be awarded under this section, restitution can be ordered where the action is for a permanent injunction. Furthermore, the Director may apply ex parte for an interim injunction (s.16(5)), though if applying ex parte, he must establish that there are reasonable and probably

grounds for believing that an immediate threat to the interests of persons dealing with the supplier exists.

Similarly, in Alberta the Director may commence an action under section 12, and the court may make a declaratory order, grant an injunction order the supplier to provide redress to injured consumers and to grant other appropriate relief. However, section 18.1 provides that the Director shall not commence or maintain an action under this section (and others) without the authorization of the Attorney General.

The Ontario statute does not contain provision for institution of court proceedings by the Director, but the Director himself does have powers to obtain certain types of redress without court intervention (see below). The Federal statute provides for injunctive relief upon the application of the Attorney General but the statutory requirements are such that it is unlikely that the damage arising from any threatened contravention of the deceptive trade practices sections would be sufficient for a court to grant the injunction.

Substitute Actions

Both British Columbia and Alberta provide for substitute actions initiated by the Director, though there is a substantial difference in the scope of their respective provisions.

Alberta provides in section 13 that the Director may, where he believes it in the public interest to do so, commence and maintain an action with the consumer's consent, where such action arises under the provision of the Act conferring a cause of action upon the individual consumer. The Director may also maintain an action commenced by a consumer.

By way of contrast, the British Columbia statute provides that the Director may, with the consent of the consumer and of the Minister, and where he believes it to be in the public interest to do so, and where he is satisfied that a consumer "has a cause of action, a good defence to an action or grounds for setting aside a default judgment" institute against or defend any proceedings initiated by a supplier with a view to enforcing or protecting the rights

of the consumer respecting a contravention or suspected contravention by the supplier of those rights or of the provisions of any Act or law relating to the protection or interests of consumers.

The Ontario Act and the Federal Act contain no measures relating to substitute actions.

Director's Powers

In contrast to the Alberta and British Columbia statutes, Ontario's main enforcement vehicle is the power given to the Director to control without judicial intervention, the prohibited unfair practices.

The Director in Ontario may order a person to refrain from engaging in a specified act or practice provided notice and the reasons for the order are furnished. An order under section 6 is subject to a right of hearing before a Tribunal; if no hearing is requested or upon the expiration of 15 days, the order takes effect. An order by the Director under section 7 takes effect immediately. Where a hearing is required by the person named, the order expires 15 days after such a request unless the hearing intervenes.

The parallel federal remedy is only available in limited circumstances. A prohibition order under section 30(1), the closest approximation to a permanent injunction, is available as part of the sentencing process, and extends to enjoining the repetition of the act or practice for which an accused was convicted. Under section 30(2), it must appear to superior court of criminal jurisdiction in proceedings initiated by information of an Attorney General that a person is about to or likely to do something directed towards or constituting an offence under Part V.

Assurances of Voluntary Compliance

All provincial statutes make provision for assurances of voluntary compliance between the Director and a supplier. In Ontario, the assurance has the status of an order of the Director, its breach therefore entails criminal penalties and may be entered into in lieu of the Director issuing an order to comply with the Act. In British Columbia, the circum-

stances under which it may be entered into are somewhat limited. In lieu of commencing an investigation or initiating proceedings against the supplier, the Director where satisfied that the supplier has ceased engaging in the offensive practice may accept an assurance of voluntary compliance. As in Ontario, breach of an undertaking invites criminal sanction. In Alberta, the Director must be satisfied the unfair practice has ceased before he accepts an undertaking of voluntary compliance. Breach of the undertaking does not entail criminal sanctions but renders the supplier subject to proceedings before the courts at the instance of the Director under section 12, where the court may order punitive or exemplary damages as well as the other relief provided (section 12(2)).

Publicity

Both British Columbia and Alberta empower a court, in granting relief, to make a further order requiring a supplier to advertise to the public particulars of the relief granted by the court.

Other Orders

The provincial statutes also provide for orders to refrain from dealing with assets. In Alberta, it is available from a court on the Director's application, where a supplier has absconded or the Director has reasonable and probable grounds to believe that a supplier is about to abscond from the Province, or is dissipating his assets or monies paid and securities granted him by consumers. It may prohibit any third party holding funds or in possession or control of the supplier's assets or property or having debts or other choses in action payable the supplier, from dealing with them; may appoint a trustee or receiver for them; and may direct any supplier who is the subject of an inquiry not to disperse any funds, property, etc. (section 9). The Ontario and British Columbia orders (sections 13 & 13A) are similar in nature but they do not require the intervention of a court. The British Columbia directive may be issued where an investigation has been ordered, the Ontario order where an assurance of voluntary compliance has been given, an order to comply with the Act issued or an investigation commenced, provided the Director believes the order to refrain from dealing with assets is in the best

interests of the consumers dealing with the supplier in question.

	ONTARIO The Business Practices Act S.O. 1974 c.131	BRITISH COLUMBIA Trade Practices Act SBC 1974 c.96	ALBERTA The Unfair Trade Practices Act* 1975 c.33	CANADA Combines Investigation Act as amended by Bill C-2
SCOPE				
1. Definitions: Parties/Transactions to which the Legislation Pertains				
CONSUMER	Sec. 1 Interpretation. - In this Act, (b) "consumer" means a natural person but does not include a natural person, partnership or association of individuals acting in the course of carrying on business;	Sec. 1 Interpretation. - (1) In this Act, unless the context otherwise requires, "consumer" means an individual, other than a supplier, who participates in a consumer transaction, and includes a guarantor or donee of that individual;	1. In this Act, (a) "consumer" means (i) a person who receives or has the right to receive goods or services or both under a consumer transaction, or (ii) an individual who receives goods or services or both as a gift to him from a person who obtained or has the right to obtain the goods or services or both from a supplier, or (iii) a person who is or may become obligated at law to pay all or part of the consideration under a consumer transaction to a supplier or to otherwise compensate a supplier for goods or services or both, whether or not he is the recipient of or has the right to receive the goods or services;	

*Received Royal Assent in July 75

	ONTARIO	BRITISH COLUMBIA	ALBERTA	CANADA
SUPPLIER /SUPPLY		"supplier" means a person, other than a consumer, who, in the course of his business, solicits, offers, advertises or promoted the disposition or supply of the subject of a consumer transaction or who engages in, enforces, or otherwise participates in a consumer transaction, whether or not any privity of contract exists between the person and the consumer, and includes the successor to, and assignee of, any rights or obligations of the supplier;	(h) "supplier" means (i) a person who in the course of his business becomes liable under a consumer transaction to sell, lease or otherwise dispose of goods or to provide services or both, or in the case of an award by chance of goods or services or both, to provide the goods or services awarded, or (ii) a person who in the course of his business (A) manufacturers, assembles or produces goods that are the subject of a consumer transaction, or (B) acts as a wholesaler or distributor of goods that are the subject of a consumer transaction, or (C) solicits, advertises or otherwise promotes the use, purchase or acquisition in any manner of goods or services that are the subject of a consumer transaction, or (iii) a person who receives or is entitled to receive all or part of the consideration paid or payable under a consumer transaction, whether as a party thereto or as an assignee or otherwise, or who is otherwise entitled to be compensated by a consumer for goods or services or both.	2. In this Act, "supply" means, (a) in relation to an article, sell, rent, lease or otherwise dispose of an article or an interest therein or a right thereto, or other so to dispose of an article or interest therein or a right thereto, and (b) in relation to a service, sell, rent or otherwise provide a service or offer so to provide a service; 36(3) Subject to subsection(2). everyone who, for the purpose of promoting directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) shall be deemed to have made that representation to the public.

	ONTARIO.	BRITISH COLUMBIA	ALBERTA	CANADA
CONSUMER REPRESENTATION/ TRANSACTION	(c) "consumer representation" means a representation, statement, offer, request or proposal, (i) made respecting or with a view to the supplying of goods or services, or both, to a consumer, or (ii) made for the purpose of or with a view to receiving consideration for goods or services, or both, supplies or purporting to have been supplied to a consumer;	"consumer representation" means (i) a sale, lease, rental, assignment, award by chance, or other disposition or supply of any kind of personal property to an individual for purposes that are primarily personal, family, or household, or that relate to a business opportunity requiring both expenditure of money or property and personal services by that individual and in which he has not been previously engaged, or (ii) a solicitation or promotion by a supplier with respect to a transaction referred to in subparagraph (i); "representation" includes any term of a written contract or form of contract, notice, or other document used or relied on by a supplier in connection with a consumer transaction;	(c) "consumer transaction" (i) a sale or lease of goods or any other disposition of goods for a consideration, whether or not the sale, lease or disposition includes any agreement or arrangement under which services are provided, or (ii) an agreement, or arrangement under which services are provided for consideration, or (iii) an award by chance of goods or services or both;	36(2) For the purposes of this section and section 36.1, a representation that is (a) expressed on an article offered or displayed for sale, its wrapper or container, (b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale, (c) expressed on an in-store or other point-of-purchase display, (d) made in the course of instore, door-to-door or telephone selling to a person as ultimate user, or (e) contained in or on anything that is sold, sent delivered, transmitted or in any other manner whatever made available to a member of the public, shall be deemed to be made to the public by and only the person who caused the representation to be so expressed made or contained and, where that (f) the person who imported the article into Canada, in a case described in paragraph (a), (b) or (e), and (g) the person who imported the display into Canada, in a case described in paragraph (c).

ONTARIO

BRITISH COLUMBIA

ALBERTA

CANADA

(3) Subject to subsection (2), every one who, for the purpose of promoting directly or indirectly the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) shall be deemed to have made that representation to the public.

GOODS and SERVICES; PRODUCT/ ARTICLES/ BUSINESS

ONTARIO

(f) "goods" means chattels personal or any right or interest therein other than things in action and money, including chattels that become fixtures but not including securities as defined in The Securities Act;

(i) "services" means services,
- (i) provided in respect of goods or of real property, or
- (ii) provided for social, recreational or self-improvement purposes, or
- (iii) that are in their nature instructional or educational;

BRITISH COLUMBIA

"service" means services that are the subject of a consumer transaction, either together with, or separate from, any kind of personal property;

ALBERTA

(f) "goods" means chattels personal or any right or interest therein that are to be used by an individual for purposes that are primarily personal, family or household and includes chattels that become fixtures subsequent to a consumer transaction but does not include
- (i) things in action, or
- (ii) money, or
- (iii) securities as defined in The Securities Act, or
- (iv) chattels personal acquired by a person for the purpose of sale;

(g) "services" means services
- (i) provided in respect of the maintenance or repair of goods or of real property used as a private dwelling by an individual, or used by an injunction with a private dwelling, or
- (ii) provided to an individual in conjunction with the use of social, recreational or physical fitness facilities, or
- (iii) provided to an individual in respect of the movement, transport or storage of goods, or
- (iv) that are in their nature instructional or educational;

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"product" includes an article and a service;
"service" means a service of any description whether industrial, trade, professional or otherwise;
"article" means real and personal property of every description including
- (a) money,
- (b) deeds and instruments relating to or evidencing the title or right to property or an interest, immediate contingent or otherwise, in a company or in any assets of a company,
- (c) deeds and instruments giving a right to recover or receive property,
- (d) tickets or like evidence of right to be in attendance at a particular place at a particular time or times, and
- (e) energy, however generated,

"business" includes the business of
- (a) manufacturing, producing transporting, securing, supplying, storing and otherwise dealing in articles, and
- (b) acquiring, supplying and otherwise dealing in services,

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"price" means the total obligation or consideration payable, given, undertaken, or assumed by a consumer under a consumer transaction;

2. Prohibited Practices

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GENERAL	Sec. 2.Unfair Practices - For the purposes of this Act the following shall be deemed to be unfair practices, (a) a false, misleading or deceptive consumer representation including, but without limiting the generality of the foregoing	Sec. 2.Deceptive acts or practices - (1) For the purposes of this Act, a deceptive act or practice includes (a) any oral, written, visual descriptive, or other representation, including nondisclosure; or (b) any conduct having the capability, tendency, or effect of deceiving or misleading a person.	4.(1) For the purposes of this Act, the following are unfair acts or practices: (d) any representation or conduct that has the effect, or might reasonably have the effect, of deceiving or misleading a consumer or potential consumer and, without limiting the generality of the foregoing, includes any representation or conduct of the following kinds	36(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever (a) make a presentation to the public that is false or misleading in a material respect;

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WITH RESPECT TO PERFORMANCE ENDORSEMENT CHARACTERISTICS OF THE SUBJECT MATTER	(i) a representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or quantities they do not have, (ii) a representation that the person who is to supply the goods or services has sponsorship, approval, status, affiliation or connection he does not have, (iii) a representation that the goods are of a particular standard quality, grade, style or model, if they are not,	(3) (Examples of deceptive practices). - Without limiting the generality of subsection (1), one or more of the following, however expressed, constitutes a deceptive act or practice: (a) A representation that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses, or benefits that it does not have; (b) A representation that the supplier has a sponsorship, approval, status, affiliation, or connection that he does not have; (c) A representation that the subject of a consumer transaction is of a particular standard, quality grade, style, or model if it is not;	(i) a representation that the goods or services have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have; (ii) a representation that the supplier has a sponsorship, approval status, affiliation or connection that he does not have; (iii) a representation that the goods are of a particular standard, quality, grade, style or model, if they are not;	(b) make a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof the proof of which lies upon the person making the representation; 36.1 (1) No person shall for the purpose of promoting, directly or indirectly, the supply or use of any product, or for the purpose of promoting directly or indirectly, any business interest (a) make a representation to the public that a test as to the performance, efficacy or length of life of the product has been made by any person, or (b) publish a testimonial with respect to the product except where he can establish that (c) the representation or testimonial was previously made or published by the person by whom the test was made or the testimonial was given as the case may be, or (d) the representation or testimonial was, before being made or published, approved and permission to make or publish it was given in writing by the person by whom the test was made or the testimonial was given, as the case may be, and the representation or testimonial accords with the representation or testimonial previously made, published or approved;

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...USE AND HISTORY	(iv) a representation that the goods are new, or unused, if they are not or are reconditioned or reclaimed, provided that the reasonable use of goods to enable the seller to service, prepare, test and deliver the goods for the purpose of sale shall not be deemed to make the goods used for the purpose of this subclause, (v) a representation that the goods have been used to an extent that is materially different from the fact.	(d) A representation that the subject of a consumer transaction has been used to an extent that is different from the fact; (e) A representation that the subject of a consumer transaction is new or unused if it is not, or if it is deteriorated, altered, reconditioned, or reclaimed; (f) A representation that the subject of a consumer transaction has a particular prior history or usage if it has not;	(iv) a representation that the goods have been used to an extent that is different from the fact; (v) a representation that the goods are new or unused if they are are not; (vi) a representation that the goods are new or unused if they are deteriorated, altered, reconditioned or reclaimed; (vii) a representation that the goods have a particular prior history or usage if they have not;	36(1) (a) make a representation to the public that is false or misleading in a material respect;

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				36(1)
...WITH RESPECT TO THE REASONS FOR AND TERMS UPON WHICH AVAILABLE	(vi) a representation that the goods or services are available for a reason that does not exist, (vii) a representation that the goods or services have been supplied in accordance with a previous representation, if they have not,	(g) A representation that the subject of a consumer transaction is available for a reason that is different from the fact; (h) A representation that the subject of a consumer transaction has been made available in accordance with a previous representation if it has not;	(viii) a representation that the goods or services are available for a reason that is different from the fact; (ix) a representation that the goods or services have been made available in accordance with a previous representation if they have not;	(a) make a representation to the public that is false or misleading in a material respect;

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NON-AVAILABILITY	(viii) a representation that the goods or services or any part thereof are available to the consumer when the person making the representation knows or ought to know they will not be supplied,	(i) A representation that the subject of a consumer transaction is available if the supplier has no intention of supplying or otherwise disposing of the subject as represented;	(x) a representation that the goods or services are available if the supplier has no intention of supplying or otherwise providing the goods or services as represented or if the supplier does not have any reasonable grounds on which to believe that he has the ability to supply or otherwise provide the goods or services as represented;	37 (1) For the purposes of this section, "bargain price" means (a) a price that is represented in an advertisement to be a bargain price, by reference to an ordinary price or otherwise; or (b) a price that a person who reads, hears or sees the advertisement would reasonably understand to be a bargain price by reason of the prices at which the product advertised or like products are ordinarily sold. (2) No person shall advertise at a bargain price a product that he does not supply in reasonable quantities having regard to the nature of the market in which he carries on business, the nature and size of the business carried on by him and the nature of the advertisement.

(3) Subsection (2) does not apply to a person who establishes that

(a) he took reasonable steps to obtain in adequate time a quantity of the product that would have been reasonable having regard to the nature of the advertisement, but was unable to obtain such a quantity by reason of events beyond his control that he could not reasonably have anticipated;

(b) he obtained a quantity of the product that was reasonable having regard to the nature of the advertisement but was unable to meet the demand therefor because that demand surpassed his reasonable expectations; or

(c) after he became unable to supply the product in accordance with the advertisement, he undertook to supply the same product or an equivalent product of equal or better quality at the bargain price and within a reasonable time to all persons who requested the product and who were not supplied therewith during the time when the bargain price applied and that he fulfilled the undertaking.

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PARTS, SERVICE, REPAIR	(ix) a representation that a service, part, replacement or repair is needed, if it is not,	(k) A representation that a service, part replacement, or repair is needed if it is not;	(xii) a representation that a part, replacement, repair or adjustment is needed if it is not;	

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PRICE	(x) a representation that a specific price advantage exists, if it does not,	(j) A representation that is such that a person could reasonably conclude that a price benefit or advantage exists, if it does not;	(xi) a representation that a specific price benefit or advantage exists if it does not;	36(1) No person shall, for the purpose of promoting directly or indirectly, the supply or use of a product or for the purpose of promoting directly or indirectly, any business interest, by any means whatever, (d) make a materially misleading representation to the public concerning the price at which a product or like products have been, are or will be ordinarily sold; and for the purpose of this paragraph a representation as to price is deemed to refer to the price at which the product had been sold by sellers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold by the person by whom or on whose behalf the representation is made. 37.1 (1) No person who advertises a product for sale or rent in a market shall, during the period and in the market to which the advertisement relates, supply the product at a price that is higher than the price advertised. (3) This section does not apply (a) in respect of an advertisement that appears in a catalogue in which it is prominently stated that the prices contained therein are subject to error if the person establishes that the price advertised is in error,

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				(b) in respect of an advertisement that is immediately followed by another advertisement correcting the price mentioned in the first advertisement, or (c) in respect of the sale of a security obtained on the open market during a period when the prospectus relating to that security is still current
PURPOSE/ INTENT	(xiv) a representation that misrepresents the purpose or intent of any solicitation of or any communication with a consumer;	(l) A representation that the purpose or intent of any solicitation of, or any communication with, a consumer by a supplier is for a purpose or intent different from the fact;	(xiii) a representation by a supplier that a solicitation by that supplier is for a particular purpose if, in fact, that solicitation is made for a different purpose than was represented;	36(1) (a) make a representation to the public that is false or misleading in a material respect;

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				36(1)
RIGHTS, REMEDIES, OBLIGATIONS	(xii) a representation that the proposed transaction involves or does not involve rights, remedies or obligations if the indication is false or misleading,	(m) A representation that a consumer transaction involves or does not involve rights, remedies, or obligations if the representation is deceptive or misleading;	(xiv) a representation that a consumer transaction involves or does not involve rights, remedies or obligations if the representation is deceptive or misleading;	(a) make a representation to the public that is false or misleading in a material respect;

	ONTARIO	BRITISH COLUMBIA	ALBERTA	CANADA
QUANTITY OF SUBJECT MATTER (of non-availability)		(n)* A representation such that a consumer might reasonably conclude that the subject of a consumer transaction is available in greater quantities than are in fact available from the supplier, unless the limitation of availability represented by the supplier has been given such prominence as is required by the regulations;	(xv) a representation such that a consumer might reasonably conclude that the goods are available in greater quantities than are in fact available from the supplier;	37 (1) For the purposes of this section, "bargain price" means (a) a price that is represented in an advertisement to be a bargain price, by reference to an ordinary price or otherwise; or (b) a price that a person who reads hears or sees the advertisement would reasonably understand to be a bargain price by reason of the prices at which the product advertised or like products are ordinarily sold (2) No person shall advertise at a bargain price a product that he does not supply in reasonable quantities having regard to the nature of the market in which he carries on business, the nature and size of the business carried on by him and the nature of the advertisement.

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AUTHORITY TO NEGOTIATE	(xi) a representation that misrepresents the authority of a salesman, representative, employee or agent to negotiate the final terms of the proposed transaction,	(o) A representation as to the authority of a salesman, representative, employee, or agent to negotiate the final terms of a consumer transaction if the representation is different from the fact;	(xvi) a representation as to the authority of a salesman, representative, employee or agent to negotiate the final terms of a consumer transaction if the representation is different from the fact;	

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ESTIMATE OR QUOTATION		(p)* Where an estimate of the price of a consumer transaction is materially less, as determined by the regulations, than the price of the consumer transaction as subsequently determined or demanded by the supplier and the supplier has proceeded with his performance of the consumer transaction without the express consent of the consumer;	(xvii) giving an estimate or quotation of the price of the goods or services which is materially less than the price of the goods or services as subsequently determined or demanded by the supplier and the supplier has proceeded with his performance of the consumer transaction without the express consent of the consumer;	

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RELATIVE PROMINENCE OF PRICE OF UNIT PART	(q) Where the price of a unit of a consumer transaction is given in an advertisement, display, or representation, the failure to give, in the same advertisement, display, or representation, at least equal prominence to the total price of the consumer transaction;	(xviii) giving, in any advertisement or display, less prominence to the total price of the goods or services than to the price of any part of the goods or services.	

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WARRANTY

36 (1) No person shall, for the purpose of promoting, directly or indirectly the supply or use of a product or for the purpose of promoting directly or indirectly, any business interest, by any means whatever,

(c) make a representation to the public in a form that purports to be

(i) a warranty or guarantee of a product, or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result

if such form of purported warranty or guarantee or promise is materially misleading, or if there is no reasonable prospect that it will be carried out;

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GENERAL IMPRESSION/ EXAGGERATION, AMBIGUITY	(xiii) a representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive,	(r) The use, in any oral or written representation, of exaggeration, innuendo or ambiguity as to a material fact, or failure to state a material fact, if the representation is deceptive or misleading;		36 (4) In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

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GENERAL	(c) such other consumer representations under clause (a) as are prescribed by the regulations made in accordance with section 16	(s) Such other acts or practices as may be prescribed by the regulations		

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DOUBLE TICKETING

36.2(1) No person shall supply a product at a price that exceeds the lowest of two or more prices clearly expressed by him or on his behalf, in respect of the product in the quantity in which it is so supplied and at the time at which it is so supplied,

(a) on the product, its wrapper or container,

(b) on anything attached to, inserted in or accompanying the product, its wrapper or container or anything on which the product is mounted for display or sale, or

(c) on an in-store or other point of purchase display or advertisement

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UNCONSCION-ABILITY	Sec. 2.Unfair practices - For the purposes of thia Act, the following shall be deemed to be unfair practices, (b) an unconscionable consumer representation made in respect of a particular transaction and in determining whether or not a consumer representation is unconscionable there may be taken into account that the person making the representation or his employer or principal knows or ought to know,	Sec. 3.Unconscionable act or practice. (2) [Determination of unconscionable practice] - In determining whether or not an act or practice is unconscionable, a court of competent jurisdiction shall consider all the surrounding circumstances which the supplier knew or ought to have known, including without limiting the generality of the foregoing,	4(1) For the purposes of this Act, the following are unfair acts or practices:	

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PRESSURE	(viii) that he is subjecting the consumer to undue pressure to enter into the transaction;	(a) that the consumer was subjected to undue pressure to enter into the consumer transaction;	(a) the subjection of the consumer to undue pressure by a supplier to enter into a consumer transaction;	

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CONSUMER DISABILITY EXPLOITING	(i) that the consumer is not reasonably able to protect his interests because of his physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factors,	(b) that the consumer was taken advantage of by his inability or incapacity to reasonably protect his own interest by reason of his physical or mental infirmity, ignorance, illiteracy, age, or his inability to understand the character, nature, or language of the consumer transaction or any other matter related thereto;	(b) the entering into a consumer transaction by a supplier where (i) the consumer's ability was such that he was not reasonably able to understand the character or nature of that consumer transaction, and (ii) that supplier took unfair advantage of that consumer's inability to understand the character or nature of that consumer transaction;	

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PRICE	(ii) that the price grossly exceeds the price at which similar goods or services are readily available to like consumers,	(c) that, at the time the consumer transaction was entered into, the price grossly exceeded the price at which similar subjects of similar consumer transactions were readily obtainable by like consumers;		

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NO SUBSTANTIAL BENEFIT	(iii) that the consumer is unable to receive a substantial benefit from the subject-matter of the consumer representation,		(c) the entering into a consumer transaction by a supplier in circumstances where (i) the supplier knew that there was a defect in the goods or that any or all of the services could not be provided, (ii) the supplier knew that the consumer was not aware of or could not reasonably become aware of the defect in the goods or the fact that any or all of the services could not be provided, and (iii) the defect in the goods or the failure to provide any or all of the services substantially impairs or is likely to impair substantially the benefit or benefits reasonably anticipated by that consumer under that consumer transaction;

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PROBABILITY OF PAYMENT	(iv) that there is no reasonable probability of payment of the obligation in full by the consumer,	(d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the price by the consumer;		

	ONTARIO	BRITISH COLUMBIA	ALBERTA	CANADA
ONESIDEDNESS /INEQUITY	(v) that the proposed transaction is excessively one-sided in favour of someone other than the consumer, (vi) that the terms or conditions of the proposed transaction are so adverse to the consumer as to be inequitable,	(e) that the terms or conditions on, or subject to, which the consumer transaction was entered into by the consumer are so harsh or adverse to the consumer as to be inequitable; and		

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RELIANCE UPON MISLEADING STATEMENT OF OPINION	(vii) that he is making a misleading statement of opinion on which the consumer is likely to rely to his detriment,			

GENERAL

(f) such other circumstances as may be prescribed by the regulations

B.C. Reg. 134/75
Filed February 10, 1975
Pursuant to section 32(o), a circumstance to be considered by the court is whether with respect to a consumer transaction involving the sale, transfer, assignment or other disposition by a consumer to a supplier of the consumer's right or possible right to receive now or at any time in the future, a payment, refund or other benefit, the amount received or to be received by the consumer from the supplier is so small in relation to the total amount to which the consumer would be entitled if the consumer transaction had not been entered into, the result is harsh or inequitable.

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3. Offences and Penal Sanctions				
with respect to FURNISHING INFORMATION	Sec. 3.Unfair practices prohibited. – (1) No person shall engage in an unfair practice. (2) One act deemed practice.– A person who performs one act referred to in section 2 shall be deemed to be engaging in an unfair practice. (See Sec. 17(2) below)	(c.f. below section 25(2) Sec. 25.Offences – (1) Every person who (b) refuses or fails to furnish information as required under this Act, or furnishes false information to any person acting under this Act; or	17(1) Every person and every director, officer or employee of a person who (a) refuses to provide information required under section 5, or (b) provides false information when providing information under section 5, is guilty of an offence and liable on summary conviction to a fine of not more than $5,000 or to imprisonment for a term of not more than one year, or to both.	Note: Section 36-37.2 contain specific prohibitions. C.F. s.42 (infra)
CONTRAVENTION OF ACT OR REGULATION NONCOMPLIANCE WITH ORDER, ASSURANCE OR UNDERTAKING	Sec. 17. Offences –(1) Every person who, knowingly, (a) furnishes false information in an investigation under this Act; (b) contravenes a regulation; (c) fails to comply with any order or assurance of voluntary compliance made or entered into under this Act; or (d) obstructs a person making an investigation under section 10 or 11, is guilty of an offence and on summary conviction is liable to a fine of not more than $2,000 or to imprisonment for a term of not more than one year, or to both .	(a) contravenes this Act or the regulations, or an order of the director or minister under this Act; or (c) fails to comply with any order of the Court; or (d) fails to comply with any written undertaking or assurance, made or entered into under this Act, unless the undertaking or assurance has been rescinded by written consent of the director, or minister, or by the Court, is guilty of an offence and is liable, on summary conviction, to a fine of not more than five thousand dollars, or to imprisonment for a term of not more than one year, or to both such a fine and such imprisonment.	(2) Where a regulation is made pursuant to section 21, clause (a), every supplier and every director, officer or employee of a supplier who makes a representation to which the regulation applies and that does not contain as part thereof the information prescribed by the regulation, is guilty of an offence and liable on summary conviction to a fine of not more than $1,000 or to imprisonment for a term of not more than three months, or both.	

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ENGAGING IN PRACTICE	(2) Idem.- Every person who engages in an unfair practice other than an unfair practice prescribed by a regulation made under clause c of subsection 1 of section 16, knowing it to be an unfair practice is guilty of an offence and on summary conviction is liable to a fine of not more than $2,000 or to imprisonment for a term of not more than one year, or to both.	(2) (Suppliers).- Every supplier who does, engages in, or participates in a deceptive or unconscionable act or practice in respect of a consumer transaction contravenes this Act and is guilty of an offence and is liable, on summary conviction, to a fine of not more than five thousand dollars, or to imprisonment for a term of not more than one year, or to both such a fine and such imprisonment		
corporation	(3) Corporation.- Where a corporation is convicted of an offence under subsection 1 or 2, the maximum penalty that may be imposed upon the corporation is $25,000 and not as provided therein.	(3) [Corporations]. - Notwithstanding subsection (1) or (2), where a corporation is convicted of an offence under subsection (1) or (2), the corporation is liable to a fine of not more than one hundred thousand dollars.		
directors, officers	(4) Directors and Officers. - Where a corporation has been convicted of an offence under subsection 1 or 2, (a) each director of the corporation; and (b) each officer, servant or agent of the corporation who was in whole or in part responsible for the conduct of that part of the business of the corporation that gave rise to the offence, is a party to the offence unless he satisfies the court that he did not authorize, permit or acquiesce in the offence.	(4) [Officers and Directors]. - Where a corporation is guilty of an offence under subsection (1) or (2), (a) every director or officer; and (b) every other person who authorized, permitted, or acquiesced in, the offence is guilty of the offence personally.		

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limitation	(5) Limitation period.- No proceedings under this section shall be commenced more than two years after the time when the subject-matter of the proceeding arose.	Sec. 26 Limitation.- No prosecution under this Act shall be commenced more than two years after the date upon which the subject matter of the proceedings arose.		44(5) Proceedings in respect of an offence that is declared by this Act to be punishable on summary conviction may be instituted at any time after the time that the subject matter of the proceedings arose.

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EXEMPTION	(6) Exemption re advertisements.- A representation or advertisement printed, published, distributed, broadcast or telecast by a person on behalf of another in the ordinary course of business and circumstances that are not a contravention of subsection 2 shall not be deemed to be unfair practices for the purposes of section 3, but this sub-section shall not be applied to affect the application of section 6*to the representation *see page 27 - Order to cease unfair practices	Sec. 1A. Advertising - (1) A supplier who, on behalf of another person, prints, distributes, broadcasts, telecasts, or otherwise publishes an advertisement that is deceptive or misleading is not liable under section 16, 20, or 25 where he proves that he (a) received the advertisement for printing, distributing, broadcasting, telecasting, or otherwise publishing in the ordinary course of business, and (b) did not know and had no reason to suspect that its publication would amount to a contravention of this Act (2) [Records].- Any supplier who accepts an advertisement for printing, distributing, broadcasting, telecasting, or otherwise publishing in the ordinary course of his business shall, in respect of each advertisement, maintain a record of the name and address of the person who furnishes the advertisement.	(3) [Inapplicability of Act]. - This Act does not apply to services provided by (a) a person employed in domestic work in a private dwelling, or (b) a person employed in casual employment (4) [Exemptions].- The provisions of section 4, subsection (1), clauses (a), (b), and (c) and clause (d), subclause (i) to (xvii) do not apply to a supplier who, on behalf of another person, (a) broadcasts by radio or television or prints, publishes or distributes a representation or an advertisement that he accepts in good faith for broadcasting, printing, publishing, or distributing in the ordinary course of his business, or (b) creates or produces, in good faith, a representation or an advertisement in the ordinary course of his business.	37.3 (1) Sections 36 to 37.2 do not apply to a person who prints or publishes or otherwise distributes a representation or an advertisement on behalf of another person in Canada where he establishes that he obtained and recorded the nature and address of that other person and that he accepted the representation or advertisement on good faith for printing, publishing or other distribution in the ordinary course of his business.

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DEFENCES	Sec. 25A.Defences in proceedings under s. 25.-(1) In proceedings for an offence under section 25 it is, subject to subsection (2), a defence for the person charged to prove (a) that the commission of the offence was due to a mistake, or to reliance on information supplied to him, or to the act or default of another person, or to an accident or some other cause beyond his control, and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person, under his control. (2)[Identification of other person]. - Where the defence provided by subsection (1) involves the allegation that the commission of the offence was due to (a) the act or default of another person, or (b) reliance on information supplied by another person the person charged may not, without leave of the court, rely on that defence unless he served on the prosecutor, within a period ending 7 clear days before the trial, a notice in writing, giving such information as was then in his possession identifying or assisting in the identification of that other person.		(2) No person shall be convicted of an offence under section 36 or 36.1 if he establishes that (a) the act or omission giving rise to the offence with which he is charged was the result of error; (b) he took reasonable precautions and exercised due diligence to prevent the occurrence of such error; (c) he, or another person, took reasonable measures to bring the error to the attention of the class of persons likely to have been reached by the representation or testimonial; and (d) the measures referred to in paragraph (c), except where the representation or testimonial related to a security, were taken forthwith after the representation was made or the testimonial was published. (3) Subsection (2) does not apply in respect of a person who, in Canada, on behalf of a person outside Canada, makes a representation to the public or publishes a testimonial.

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4. Civil Remedies - Available at the Instance of a Consumer or Consumers' Organization			
NO DEROGATION	Sec. 23 No derogation. - The provisions of this Act apply notwithstanding any agreement to the contrary, and do not restrict, limit, or derogate from any other rights of a consumer under any other law.	19.(1) The provisions of this Act apply notwithstanding any agreement to the contrary and any waiver or release given of the rights, benefits or protections provided under this Act is against public policy and void. (2) Nothing in this Act restricts, limits or derogates from any remedy that a person has at common law or under statute.	39. Except as otherwise provided in this Part, nothing in this Part shall be construed to deprive any person of any civil right of action.
UNENFORCEABLE BY SUPPLIER	3.(3) [Consumer transaction rendered unenforceable] - Where there is an unconscionable act or practice in respect of a consumer transaction, that consumer transaction is unenforceable by the supplier.		

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DAMAGES AND EQUITABLE RELIEF	Sec. 4.Rescission -(1) Subject to subsection 2, any agreement, whether written, oral or implied, entered into by a consumer after a consumer representation that is an unfair practice and that induced the consumer to enter into the agreement, (a) may be rescinded by the consumer and the consumer is entitled to any remedy therefor that is at law available, including damages; or (b) where rescission is not possible because restitution is no longer possible or because rescission would deprive a third party of a right in the subject matter of the agreement that he has acquired in good faith and for value, the consumer is entitled to recover the amount by which the amount paid under the agreement exceeds the fair value of the goods or services received under the agreement or damages, or both.	Sec. 20.Damages recoverable by consumer - (1) Where a consumer has entered into a consumer transaction involving a deceptive or unconscionable act or practice by a supplier, a court of competent jurisdiction may, in an action in respect of the transaction, (a) award the consumer damages in the amount of any loss or damage suffered by the consumer by reason of the deceptive or unconscionable act or practice, including punitive or exemplary damages, (b) make any order, including rescission of the transaction or restitution of any money, property, or other consideration given or furnished by the consumer, and (c) subject to section 3 (3), impose such other terms as the court considers just.	*11 (1) Where a consumer (a) has entered into a consumer transaction, and (b) in respect of that consumer transaction, has suffered damage or loss due to an unfair act or practice, that consumer may commence an action in a court against any supplier who engaged in or acquiesced in the unfair act or practice that caused that damage or loss, for relief from that damage or loss. (2) In an action under this section, the court may (a).... (b) award damages for damage or loss suffered; (c) award punitive or exemplary damages; (d) make an order for (i) specific performance of the consumer transaction, or (ii) restitution of property or funds, or (iii) recission of the consumer transaction;	31.1 (1) Any person who has suffered loss or damages as a result of (a) conduct that is contrary to any provision of Part V, or (b) the failure of any person to comply with an order of the Commission or a court under this Act, may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

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(2) Exemplary damages. - Where the unfair practice referred to in subsection 1 comes within clause b of section 2, the court may award exemplary or punitive damages.

(3) Liability. - Each person who makes the consumer representation referred to in subsection 1 is liable jointly and severally with the person who entered into the agreement with the consumer for any amount that the consumer is entitled to under subsections 1 and 2.

(4) Liability of assignee.- Notwithstanding subsection 2 of action 42a of The Consumer Protection Act, the liability of an assignee of an agreement under subsection 1 or of any right to payment thereunder is limited to the amount paid to the assignee under the agreement.

(5) Time for rescission.- A remedy conferred by subsection 1 may be claimed by the giving of notice of the claim by the consumer in writing to each other party to the agreement within six months after the agreement is entered into.

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Sec. 21. Conclusive proof - Where an act or practice of a supplier has been declared or permanently enjoined by a Court as being a deceptive or unconscionable act or practice under section 16, the order is, in any other civil proceeding involving the supplier, other than an appeal from the order, conclusive proof that the act or practice in question is deceptive or unconscionable.

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*see infra - Re: s. 18.1 authorization of Attorney General.

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(2) In any action under subsection (1) against a person the record of proceedings in any court in which that person was convicted of an offence under Part V or convicted of or punished for failure to comply with an order of the Commission or a court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part V or failed to comply with an order of the Commission or a court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of such acts or omissions on the person bringing the action is evidence thereof in the action.

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(6) Delivery of notice.- A notice under subsection 5 may be delivered personally or sent by registered mail addressed to the person to whom delivery is required to be made, and delivery by registered mail shall be deemed to have been made at the time of mailing.

(7) Evidence.- In the trial of an issue under subsection 1, oral evidence respecting an unfair practice is admissible notwithstanding that there is a written agreement and notwithstanding that the evidence pertains to a representation of a term, condition or undertaking that is or is not provided for in the agreement.

(8) Application.- This section applies notwithstanding any agreement or waiver to the contrary.

(9) Advertisers excepted from subs. 3.- Subsection 3 does not apply to a person who, on behalf of another person, prints, publishes, distributes, broadcasts or telecasts a representation or an advertisement that he accepts in good faith for printing, publishing, distributing, broadcasting or telecasting in the ordinary course of his business.

c.f. infra re Order for Immediate Compliance by Director.

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(3) For the purposes of any action under subsection (1), the Federal Court of Canada is a court of competent jurisdiction.

(4) No action may be brought under subsection (1)
(a) in the case of an action based on conduct that is contrary to any provision of Part V, after two years from
  (i) a day on which the conduct was engaged in, or
  (ii) the day on which any criminal proceedings relating thereto were finally disposed of,
whichever is the later; and
(b) in the case of an action based on the failure of any person to comply with an order of the Commission or a court, after two years from
  (i) a day on which the order of the Commission or court was violated, or
  (ii) the day on which any criminal proceedings relating thereto were finally disposed of,
whichever is the later.

C.P. ss. 29.,1,30, infra

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DECLARATION, INJUNCTION

20.(2) [Provincial Court].- Subject to the monetary jurisdiction specified in the Small Claims Act, the Provincial Court of British Columbia has concurrent jurisdiction for the purposes of this section.

Sec. 16 Actions and proceedings.-(1) The Court, in an action brought by the director or any other person whether or not that person has a special, or any, interest under this Act or the regulations, or is affected by a consumer transaction, may grant one or more of the following.

(a) A declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction is a deceptive or unscionable act or practice;

(b) An interim or permanent injunction restraining a supplier from engaging or attempting to engage in a deceptive or unconscionable act or practice in respect of a consumer transaction.

and thereupon may make a further order requiring the supplier to advertise to the public in the media in such a manner as will assure prompt and reasonable communication to consumers, and on such terms or conditions as the Court considers are reasonable and just, particulars of any judgment, declaration, order, or injunction granted against such supplier under clause (a) or (b) or subsection (3).

11(2) In an action under this section, the court may

(a) make an order declaring that the act or practice is an unfair act or practice;

(e) grant an order in the nature of an injunction restraining the supplier from engaging in the unfair act or practice;

(f) make such directions and grant such other relief as the court considers proper.

15.(1) Upon the commencement of an action under section 11, 12 or 14, a plaintiff may apply for an order in the nature of an interim injunction and if the court is satisfied that

(a) there are reasonable and probable grounds for believing that there exists an immediate threat to the interests of persons dealing with the defendant supplier by reason of an alleged unfair act or practice, or

(b) the applicant has established a prima facia case of the existence of an unfair act or practice being committed by the defendant supplier,

the court may grant an order in the nature of an interim injunction, on such terms and conditions as the court considers proper, restraining the supplier from carrying on that act or practice that is alleged to be unfair.

*See p. 17 - Consumer Class Action,
**See p. 32, Section 12.

(Advertisement of Court Order See also page 31 s.16 Alberta.)

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(5) [Court may grant injunction ex parte].- The director may apply, ex parte, for an interim injunction under subsection (1)(b), and, if the Court is satisfied that there are reasonable and probable grounds for believing that there exists an immediate threat to the interests of persons dealing with the supplier by reasons alleged deceptive or unconscionable act or practice in respect of a consumer transaction, the Court shall grant an interim injunction on such terms and conditions as it considers just.

Sec. 17.Proof of interim injunction.- In any application under section 16 for an interim injunction,

(a) the Court shall give greater weight, importance, and the balance of convenience to the protection of consumers than to the carrying on of the business of a supplier;

(b) the director or any other person applying under that section shall not be required to post a bond or give any undertaking as to damages; and

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(2) In any application for an order in the nature of an interim injunction,

(a) the applicant need not establish that irreparable harm will be done to himself or all other consumers or any designated class of consumers in Alberta if the interim injunction is not granted, and

(b) the court may dispense with any requirement by the applicant to post a bond or give any undertaking as to damages.

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(c) the applicant need not establish that irreparable harm will be done to himself or all other consumers, or any designated class of consumers, in the Province, if the interim injunction is not granted

(restitution)

16.(3) [Court may order return of property]. - In an action for a permanent injunction under subsection (1)(b), the Court may restore to any person who has an interest therein any money or property, real or personal, that may have acquired by reason of a deceptive or unconscionable act or practice by the supplier.

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COSTS		(4) [Director entitled to costs].- In an action brought by the director under subsection (1) (a) or (b) the Court may award to the director costs, or a reasonable proportion thereof, of the investigation of a supplier, conducted under this Act. (*re declarations & injunctions)	11.(3)The court may award party and party costs and solicitor and client costs or either of them (for section 11 only)	

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NOTICE TO DIRECTOR		(6) [Security for costs not required].- In an action brought under this section, or in an appeal from such an action, the plaintiff shall not be required to furnish security for costs. Sec. 19.Notice to director.-(1) In an action under section 16 commenced by a person other than the director, that person shall serve the director with a copy of the writ of summons, (2) [Director may intervene].- Upon being served under subsection (1), the director may, upon application to the Court, intervene in any such action, as a party, on such terms and conditions as the Court considers just. (3) [Absence of notice not a bar to action].- Notwithstanding that the director has not been served pursuant to subsection (1), the Court may proceed with the action.	11.(4)[Service on Director].- When an action is commenced under subsection (1), the consumer shall serve the Director with a copy of the statement of claim. (5) Where a consumer commences an action under this section, he shall not take the next step in the action until he has serviced the Director under subsection (4). (6) Upon being served under subsection (4), the Director may, upon notice to all parties, make application to the court to be added as a party and upon the order being made the Director may take any steps he could have taken had he commenced an action under section 12.	

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CLASS ACTION

16.(2)[Class action possible]. In any action under subsection (1), any person, including the director, may sue on his own behalf and, at his option, on behalf of consumers generally, or on behalf of a designated class of consumers, in the Province.

see page 15, section 16(1)

14.(1) A consumer organization may commence and maintain an action in a court against a supplier who is engaging in or has engaged in an unfair act or practice.

(2) In an action under this section, the court may

(a) make an order declaring that the act or practice is an unfair act or practice, and

(b) grant an order in the nature of an injunction restraining the supplier from engaging in the unfair act or practice

(3) A consumer organization bringing an action under this section shall not be required to have an interest in or be affected by the matter in issue in order to commence and maintain the action.

(4) Where an action is commenced under this section, the court may order the consumer organization that commenced the action to furnish security for costs in such amount as the court considers proper.

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5.1(b) "consumer organization" means any corporation that has as one of its objects the protection or advancement of the interests of consumers and is not incorporated for the purpose of acquiring gain for its members;

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JUDICIAL AND ADMINISTRATIVE POWERS, REMEDIES and PROCEDURE
.. Investigation and Inquiry; General Duties

GENERAL DUTIES

Sec. 5.Duties of Director.- The Director shall,
(a) perform such duties and exercise such powers as are given to or conferred upon the Director under this or any other Act;
(b) receive and act on or mediate complaints respecting unfair practices;
(c) maintain available for public inspection a record of,
(i) assurances of voluntary compliance entered into under this Act,
(ii) orders to cease engaging in unfair practices issued under this Act

Sec. 4.Director's duties .-The director shall
(a) under the direction of the minister, enforce the Act and the regulations;
(b) receive and act on complaints respecting consumer transactions and may attempt to resolve complaints by mediation, or such other methods as may be acceptable to the parties;
(c) inform consumers and suppliers on a continuing basis of the provisions of the Act and the regulations and their respective rights and duties;
(d) publish, from time to time as advisable, or upon direction of the minister, reports respecting the administration and enforcement of the Act and the regulations; and
(e) maintain public records of
(i) all enforcement proceedings taken under this Act or the regulations;
(ii) all judgments and interim or permanent orders or injunctions rendered under this Act; and
(iii) all written undertakings or assurances entered into under this Act.

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CONFIDENTIALITY	Sec. 14.Matters confidential.-(1) Every person employed in the administration of this Act, including any person making an inquiry, inspection or an investigation under section 10 or 11 shall preserve secrecy in respect of all matters that come to his knowledge in the course of his duties, employment, inquiry, inspection or investigation and shall not communicate any such matters to any other person except, (a) as may be required in connection with the administration of this Act and the regulations or any proceedings under this Act or the regulations; (b) to his counsel or to the court in any proceeding under this Act or the regulations; (c) to inform the consumer involved of any unfair practice and of any information relevant to the consumer's rights under this Act; or (d) with the consent of the person to whom the information relates. (2) Testimony in civil suit.- No person to whom subsection 1 applies shall be required to give testimony in any civil suit or proceeding with regard to information, obtained by him in the course of his duties, employment, inquiry, inspection or investigation except in a proceeding under this Act or the regulations.	Sec. 5.Research, hearings.- The director may conduct research, hold public hearings, make inquiries, and publish studies respecting consumer transactions. Sec. 7 Confidentially.- The director shall not publicly disclose the name of a person investigated under this Act unless his name is a matter of public record under section 4(e) in respect of the matter investigated, or such person consents to the disclosure. Sec.12.Matters Confidential.-(1) Every person employed in the administration of this Act, including any person making an inquiry, inspection, examination, test, or investigation under section 8 or 9, shall preserve secrecy in respect of all matters that come to his knowledge in the course of his duties, employment, inquiry, inspection, examination, test, or investigation, and shall not communicate any such matters to any other person except	6.The Director shall not publicly disclose the name of a person whose conduct is the subject of an inquiry under this Act unless (a) that conduct already is the subject of an action or prosecution or is the subject of a document of public record and that person's identity has been revealed in that action, prosecution or document, or (b) that person consents to the disclosure, or (c) that person is a party to an undertaking under section 10.	"27(1) All inquiries under this Act shall be conducted in private, except that the Chairman of the Commission may order than a or any portion of such an inquiry that is held before the Commission or any member thereof be conducted in public. (2) All proceedings before the Commission under Part IV.1 of this Act shall be conducted in public.

(a) as may be required or permitted in connection with the administration of this Act or the regulations or any proceedings under this Act or the regulations; or

(b) to his counsel or to the Court in any proceeding under this Act or the regulations; or

(c) to any department or agency of any Government engaged in the administration of statutes, measures, or rulings similar to this Act, or an Act for the general protection of consumers; or

(d) with the consent of the person to whom the information relates, or

(e) in connection with an inquiry under section 11.

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INVESTIGATION AND INQUIRY	Sec. 11.-Investigation by Director.-(1) Where, upon a statement made under oath, the Director believes on reasonable and probable grounds that any person is contravening or is about to contravene any of the provisions of this Act or regulations or an order or assurance of voluntary compliance made or given pursuant to this Act, the Director may by order appoint one or more persons to make an investigation as to whether such a contravention of the Act, regulation order or assurance of voluntary compliance has occurred and the person appointed shall report the result of his investigation to the Director. Sec. 10.Investigations by order of Minister.-The Minister may by order appoint a person to make an investigation into any matter to which this Act applies as may be specified in the Minister's order and the person appointed shall report the result of his investigation to the Minister and, for the purposes of the investigation, the person making it has the powers of a commission under Part II of The Public Inquiries Act, 1971, which Part applies to such investigation as if it were an inquiry under that Act.	Sec. 8.Director's Investigation.-(1) Where, by his own inquiries, or as a result of complaints, the director has reason to believe that a person has engaged in, is engaging in, or is about to engage in a deceptive or unconscionable act or practice respecting a consumer transaction, the director may investigate the matter and may request that the person furnish to the director information respecting the matter. Sec. 9 Investigation by director or appointee.-(1) Where the director believes, on reasonable and probable grounds, that a person has contravened, is contravening, or is about to contravene a provision of this Act or the regulations or an order made under this Act, or an undertaking or assurance made or given pursuant to this Act, the director may order a full investigation of the matter by himself or a person appointed by him to investigate the matter, and (a) reasonable particulars of the matter to be investigated shall be set out in the order, and (b) where a person is appointed by the director, he shall make a full investigation of the matter and report the results of his investigation to the director.	5. The Director may (a) inquire into matters in respect of which he has reason to believe that an unfair act or practice has taken place or is taking place;	8. The Director shall (a) on application made under section 7 (b) whenever he has reason to believe that (i) a person has contravened or failed to comply with an order made pursuant to section 29, 29.1 or 30, (ii) grounds exist for the making of an order by the Commission under Part IV.I, or (iii) an offence under Part V or section 46.1 has been or is about to be committed, or (c) whenever he is directed by the Minister to inquire whether any of the circumstances described in subparagraphs (b)(i) to (iii) exists. cause an inquiry to be made into all such matters as he considers necessary to inquire into with the view of determining the facts.

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Sec. 11.-Inquiry by order of minister.- The minister may, by order, appoint one or more persons to make an inquiry into any matter to which this Act applies as may be specified in the order, and a person so appointed shall report the result of his inquiry to the minister, and, for the purposes of the inquiry, the person making it has all the power, authority, and privileges of a Commissioner under sections 7, 10, and 11 of the Public Inquiries Act.

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POWERS - RETURN OF INFORMATION		8.(2) Request for Information.-The request under subsection (1) shall give reasonable particulars of the consumer transaction and indicate the nature of the inquiry or complaint.	(b) require information from a consumer or supplier or the officers or servants of the supplier that is relevant to determining whether an unfair act or practice has taken place or is taking place.	9.(1) Subject to subsection (2), the Director may at any time in the course of an inquiry, by notice in writing require any person and in the case of a corporation any officer of the corporation, to make and deliver to the Director, within a time stated in such notice, or from time to time, a written return under oath or affirmation showing in detail such information with respect to the business of the person named in the notice as is by the notice required, and such person or officer shall make and deliver to the Director, precisely as required a written return under oath or affirmation showing in detail the information required; and, without restricting the generality of the foregoing the Director may require a full disclosure and production of all contracts or agreements which the person named in the notice may have at any time entered into with any other person, touching or concerning the business of the person named in the notice.

(2) The Director shall not issue a notice under subsection (1) unless on the ex parte application of the Director, a member of the Commission certifies, as such member may that such notice may be issued to the person or officer of a corporation disclosed in the application.

12.(1) The Director may, by notice in writing require evidence upon official written affirmation, in every case in which it seems to him proper to do so, but the Director shall not so require unless, on the ex parte application of the director, a member of the Commission certifies, as such member may, that the Director may make such a requirement to the person disclosed in the application.

	ONTARIO	BRITISH COLUMBIA	ALBERTA	CANADA
POWERS - SEARCH & INQUIRY	(2) Powers of investigator.-For purposes relevant to the subject matter of an investigation under this section, the person appointed to make the investigation may inquire into and examine the affairs of the person in respect of whom the investigation is being made and may, (a) upon production of his appointment, enter at any reasonable time the business premises of such person and examine books, papers, documents and things relevant to the subject-matter of the investigation; and (b) inquire into the transactions, business affairs, management and practices that are relevant to the subject-matter of the investigation, and for the purposes of the inquiry, the person making the investigation has the powers of a commission under Part II of The Public Inquiries Act, 1971, which Part applies to such inquiry as if it were an inquiry under that Act.	9.(2)[Powers of director].-For purposes of an investigation under this section, the director or a person appointed to make the investigation may inquire into and examine the business and affairs of the person in respect of whom the investigation is being carried out, and may, (a) upon production of his appointment, enter at any reasonable time the business premises of the person and examine any book, paper, document, and thing relevant to contraventions of this Act, make copies thereof, and, subject to subsection (7), retain anything that may be required for evidence; and (b) inquire into negotiations, transactions, loans, borrowings made by, or on behalf of, or in relation to, the person, and into property, assets, or things owned, acquired, or alienated in whole or in part by him, or any person acting on his behalf, that are relevant to the subject matter of the investigation, and, for the purpose of the inquiry, the person making the investigation has the power, authority, and privileges of a Commissioner under sections 7, 10, and 11 of the Public Inquiries Act.		10.(1) Subject to subsection (3), in any inquiry under the Act the Director or any representative authorized by him may enter any premises on which the Director believes there may be evidence relevant to the matters being inquired into and may examine any thing on the premises and may copy or take away for further examination or copying any book, paper, record or other document that in the opinion of the Director or his authorized representative as the case may be, may afford such evidence. (2) Every person who is in possession or control of any premises or things mentioned in subsection (1) shall permit the Director or his authorized representative to enter the premises, to examine any thing on the premises and to copy or take away any document on the premises. (3) Before exercising the power conferred by subsection (1) the Director or his representative shall produce a certificate from a member of the Commission, which may be granted on the ex parte application of the Director authorizing the exercise of such power.

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OBSTRUCTION	(3) Obstruction of investigator.-No person shall obstruct a person appointed to make an investigation under this section or withhold from him or conceal or destroy any books, papers, documents or things relevant to the subject-matter of the investigation.	(3)[Investigation not to be obstructed]- No person shall obstruct or impede the director or a person appointed to make an investigation under this section, or withhold from him, or conceal or destroy, any book, paper, document, or thing relevant to the subject matter of the investigation		42.(1) Every person who violates subsection 10 (2) is guilty of an offence and is liable on summary conviction or conviction on indictment to a fine of not more than five thousand dollars or to imprisonment for a term not exceeding two years or to both (2)Every person who, without good and sufficient cause, the proof whereof lies on him, refuses, neglects or fails to comply with a notice in writing requiring a written return under oath or affirmation, pursuant to section 9 or subsection 32(2) is guilty of an offence and liable on summary conviction or on conviction on indictment to a fine of not more than five thousand dollars or to imprisonment for a term, not exceeding two years or to both.

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SEARCH - COURT INTERVENTION	(4)Search warrant.- Where a provincial judge is satisfied, upon an ex parte application by the person making an investigation under this section, that the investigation has been ordered and that such person has been appointed to make it and that there is reasonable ground for believing there are in any building, dwelling, receptacle or things relating to the person whose affairs are being investigated and to the subject matter of the investigation, the provincial judge may, whether or not an inspection has been made or attempted under clause c of subsection 2, issue an order authorizing the person making the investigation, together with such police/ officer or officers as he calls upon to assist him, to enter and search, if necessary by force, such building, dwelling, receptacle or place for such books, papers, documents or things and to examine them, but every such entry and search shall be made between sunrise and sunset unless the provincial judge, by the order, authorizes the person making the investigation to make the search at night.	(4)[Court may authorize search.] Where a justice is satisfied, upon an ex parte application by the director or a person making an investigation under this section, (a) that the investigation has been authorized and that the director or such person is authorized or appointed to make it; and (b) that there is reasonable ground for believing there is, in any building, dwelling-house, receptacle or place, any book, paper, document, or thing relating to the person whose affairs are being investigated and to the subject matter of the investigation. a justice may, whether or not an inspection has been made or attempted under subsection (2)(a), make an order authorizing the person making the investigation, together with such peace officers as he calls upon to assist him, to enter, if necessary by force, and search the building, dwelling-house, receptacle, or place described in the order for such book, paper, document, or thing, and to examine them.	*Sec.7[Application for seizure order].-(1) Where the Director has reasonable and probable grounds to believe that a supplier (a) has engaged in or is engaging in an unfair act or practice, and (b) may conceal, remove or destroy any books, files, papers documents or things that are or may be relevant to determining whether or not that supplier has engaged in or is engaging in an unfair act or practice the Director may, not withstanding than an action may not have been commenced, apply ex parte to a court for an order permitting him to enter any building, dwelling, receptacle or place to search for, examine and remove, take extracts from or obtain reproduced copies of any books, files, papers, documents or things of that supplier that are or may be relevant to determining whether or not that supplier has engaged in or is engaging in an unfair act or practice. (2)[Order of court].-Upon an application under subsection (1) being made, the court may make an order upon such terms and conditions as the court considers proper.	10.(5)When the Director or his authorized representative acting under the section is refused admission or access to premises or anything therein or when the Director has reasonable grounds for believing that such admission or access will be refused a judge of a superior or county court on the ex parte application of the Director may by order direct a police officer or constable to take such steps as to the judge seem necessary to give the Director or his authorized representative such admission or access.

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(5)[Time of search].- Every entry and search under subsection (4) shall be made between eight o'clock in the forenoon and eight o'clock in the afternoon, unless a justice otherwise orders.

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(3)[Variation of order].- Upon the order being granted under subsection (2), any person affected by the order may, upon notice to the Director, apply to the court to have the order varied or set aside and upon hearing the matter the court may refuse the application or vary or set aside the order upon such terms and conditions as the court considers proper

*See infra-re: s. 18.1 authorization of Attorney General

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DISPOSITION OF DOCUMENTS ETC.	(5)Removal of books, etc.- Any person making an investigation under this section may, upon giving a receipt therefor, remove any books, papers, documents or things examined under clause a of subsection 2 or subsection 4 relating to the person whose affairs are being investigated and to the subject-matter of the investigation for the purpose of making copies of such books, papers or documents, but such copying shall be carried out with reasonable dispatch and the books, papers or documents in question shall be promptly thereafter returned to the person whose affairs are being investigated.	(6)[Removal of documents].- A person making an investigation under this section may, upon giving or leaving a general receipt therefor, remove any book, paper, document, or thing examined under subsection (2)(a) or subsection (4) for the purpose of examining or making copies or tests of, the book, paper, document, or thing. (7)[Documents to be returned].-Any book, paper, document or thing retained under subsection (6) shall be promptly returned to the person whose affairs are being investigated, unless required for the purpose of evidence in a proceeding under this Act or the regulations, in which case, the director shall, upon request and without charge, furnish to that person copies of any book, paper, or document so retained.	8. A person who, acting under an order granted under section 7, removes any books, files, papers, documents or things shall (a) give to the person from whom the items were taken a receipt for the items taken, and (b) forthwith make copies of, take photographs of or otherwise record the items removed and forthwith return the items to the person to whom the receipt was given under clause (a).	10.(4) Where any document is taken away under this section for examination or copying, the original or a copy thereof shall be delivered to the custody from which the original came within forty days after it is taken away or within such later time as may be directed by the Commission for cause or agreed to by the person from whom it was obtained.

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REPORT TO MINISTER	(8)Report.-Where, upon the report of an investigation made under subsection 1, it appears to the Director that a person may have contravened any of the provisions of this Act or the regulations, the Director shall send a full and complete report of the investigation, including the report made to him, any transcript of evidence and any material in the possession of the Director relating thereto, to the Minister.	Sec.10. Report to minister.-Where, upon the report of an investigation made under section 9(1), it appears to the director that a person may have contravened any of the provisions of this Act or the regulations, the director shall (a) send a full and complete report of the investigation including the report made to him, to the minister; and (b) enforce the Act and regulations and take whatever steps or proceedings are required or permitted by the Act or the regulations to do so.		14.(1) At any stage of the inquiry if the Director is of the opinion that the matter being inquired into does not justify further inquiry, the Director may discontinue the inquiry, but an inquiry shall not be discontinued without the written concurrence of the Commission in any case in which evidence has been brought before the Commission. (2) The Director shall thereupon make a report in writing to the Minister showing the information obtained and the reason for discontinuing the inquiry. (3) In any case where an inquiry made on application under section 7 is discontinued the Director shall inform the applicant of the decision giving the grounds therefor. (4) On written request of the applicants or on his own motion, the Minister may review the decision to discontinue the inquiry and may, if in his opinion the circumstances warrant, instruct the Director to make further inquiry.

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2. Administrative and Judicial Powers, Remedies

ORDER TO REFRAIN FROM DEALING WITH ASSETS

Sec. 12 Order to refrain from dealing with assets.
-(1) Where,
(a) an investigation of any person has been ordered under section 11; or
(b) an order has been issued against a person under section 6 or 7; or
(c) an assurance of voluntary compliance has been given under section 9.
the Director, if he believes it advisable for the protection of consumers of the person referred to in clause a, b, or c may, in writing or by telegram, direct any person having on deposit or under control or for safekeeping any assets or trust funds of the person referred to in clause a, b or c to refrain from withdrawing any such assets or trust funds from any person having any of them on deposit or under control or for safekeeping or to hold such assets or any trust funds of clients, customers or others in his possession or control in trust for any interim receiver, custodian, trustee, receiver or liquidator appointed under the Bankruptcy Act (Canada) The Judicature Act, The Corporations Act, The Business Corporations Act or the Winding-up Act (Canada), or until

Sec.13 Order to refrain from dealing with assets.
-(1) Where an investigation of any person has been ordered under section 9, the director, where he has reason to believe that it is advisable for the protection of consumers dealing with that person, may, in writing or by telegram,
(a) direct a person who the director believes has or may have in the future on deposit or under his control or for safekeeping any asset, trust fund, or other property
(i) of a person named in an order under section 9, or
(ii) of a client, customer, or debtor of the person named in the order to hold any asset, trust fund, or other property in trust for an interim receiver, custodian, trustee, receiver, or liquidator appointed
(b) direct a person who the director believes is indebted to a person named in an order under section 9 to hold any asset, trust fund, or other property that may be payable or transferable in satisfaction of the debt in trust for an interim receiver, custodian, trustee, receiver, or liquidator appointed, and

*9.(1) Where a supplier has been paid money or been given security by a consumer in respect of a consumer transaction and
(a) the supplier has absconded from Alberta, or
(b) the Director has reasonable and probable grounds to believe that the supplier
(i) is about to abscond from Alberta, or
(ii) is dissipating his assets, or
(iii) is dissipating money paid or security given to him by the consumer,
the Director may, not withstanding that an action may not have been commenced, apply ex parte to a court for an order
(c) prohibiting any person
(i) holding funds of that supplier, or
(ii) having possession of or control over any real or personal property or other assets of that supplier, or
(iii) who has any debt or other choses in action payable to that supplier,

*see infra-re: s.18.1 authorization of Attorney General.

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the Director revokes or the Tribunal cancels such direction or consents to the release of any particular assets or trust funds from the direction but, in the case of a bank, loan or trust company, the director only applies to the office, branches or agencies thereof named in the direction.

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(c) direct a person named in an order under section 9 to refrain from withdrawing any asset, trust fund, or other property from a person having any of them on deposit or under control or for safekeeping and to refrain from otherwise dealing with any particular asset, trust fund or other property that he has or may in the future have under his control, and (1975, Bill 88, s. 7.)

until the director revokes in writing the direction given under this section or consents in writing to the release of any particular asset, trust fund, or other property.

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from dispersing or otherwise dealing with the funds, property, assets, debts or choses in action except as approved by the court;

(d) appointing a trustee or receiver or both to hold or take possession of the funds, property, assets, debts or choses in action of that supplier upon such terms and conditions as the court approves;

(e) directing any supplier who is the subject of an inquiry under this Act not to dispense any funds or deal with any property, assets or debts or choses in action owing to him except as approved by the court or directed by the trustee or receiver

(2)Upon an application under subsection (1) being made, the court may make an order upon such terms and conditions as the court considers proper.

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BOND, SECURITY IN LIEU OF	(2) Bond in lieu.-Subsection 1 does not apply where the person referred to in clause a, b or c of subsection 1 files with the Director, (a) a personal bond accompanied by collateral security; (b) a bond of a guarantee company approved under The Guarantee Companies Securities Act; or (c) a bond of a guarantor, other than a guarantee company, accompanied by collateral security, in such form, terms and amount as the Director determines.	(2) [Exception].-Subsection (1) does not apply where the person to be investigated under section 9 files with the director (a) a personal bond together with collateral security; or (b) a bond of a guarantee company approved under this Act or the regulations; or (c) a bond of a guarantor, other than a guarantee company, together with collateral security in such form, terms, and amount as the director determines and in the name of for the benefit of, and deposited with the director.		
-direction from Court	(3) Application for direction.-Any person in receipt of a direction given under subsection 1, if in doubt as to the application of the direction to any assets or trust funds, or in case of a claim being made thereto by a person not named in the direction, may apply to a judge or local judge of the Supreme Court who may direct the disposition of such assets or trust funds and may make such order as to costs as seems just.	(3) [Payment into Court].-A person who receives a direction given by the director under subsection (1), (a) if in doubt as to the application of the direction to any assets, trust funds, or other property on deposit with him or under his control; or (b) where a person not named in the direction claims any right, title, or interest in the assets, trust funds, or other property, may pay or deliver such assets, trust funds, or other property into Court.		

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-effect of filing certificate

(4)[Filing of certificate has same effect as lis pendens.]-Where an investigation of a person has been ordered under section 9, the director may make and file in the office of any land registration district in which the land is situated a certificate that proceedings are being or are about to be taken that may affect land belonging to the person referred to in the notice, and the certificate shall be registered against the lands described in the notice, and the certificate, when registered, has the same effect as the registration of a lis pendens.

-revocation, amendment by director

(5)[Director may amend or revoke certificate].-The director may, in a writing filed in the proper office of a land registration district, revoke or amend the certificate.

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-upon application to court	(4)Application for cancellation of direction or registration.-Any person referred to in clause a, b or c of subsection 1 in respect of whom a direction has been given by the Director under subsection 1 may, at any time, apply to the court for cancellation in whole or in part of the direction and the court shall dispose of the application after a hearing and may, if it finds that such a direction is not required in whole or in part for the protection of consumers of the applicant or that the interests of other persons are unduly prejudiced thereby, cancel the direction in whole or in part, and the applicant, the Director and such other persons as the court may specify are parties to the proceedings before the court.	(6)[Person affected may apply to Court].-Any person (a) who is named in an order under section 9 and in respect of whom a direction under this section has been given by the director; or (b) who has paid or delivered any asset, trust fund, or other property into Court under subsection (3), or (c) who has an interest in land in respect of which a notice has been registered under subsection (4), may, at any time, apply to the Court for cancellation in whole or in part of the direction or registration, or for such variation or amendment of the direction or registration as the Court may consider just. (7)[Court may revoke or vary].-The Court shall dispose of the application under subsection (6) and may, if it finds (a) that a direction or registration under this section is not required in whole, or in part, for the protection of the consumers who are dealing with the applicant or of other persons interested in the land; or	(3)Upon the order being granted under subsection (2), any persons affected by the order may, upon notice to the Director, apply to the court to have the order varied or set aside and upon hearing the matter the court may refuse the application or vary or set aside the order upon such terms and conditions as the court considers proper.	

(b) that the interests of other persons are unduly prejudiced thereby, cancel the direction or registration in whole or in part, or make such variations or amendment of the direction or registration as the Court may consider just.

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UNDERTAKING/ ASSURANCE	Sec.9.Assurance of voluntary compliance. -(1)Any person against whom the Director proposes to make an order to comply with section * 3 may enter into a written assurance of voluntary compliance in the prescribed form undertaking to not engage in the specified unfair practices after the date thereof (2)Assurance deemed order.-Where an assurance of voluntary compliance is accepted by the Director, the assurance has and shall be given for all purposes of this Act the force and effect of an order made by the Director. (3)Undertakings.-An assurance of voluntary compliance may include such undertakings as are acceptable to the Director and the Director may receive a bond and collateral therefor as security for the reimbursement of consumers and reimbursement of the Treasurer of Ontario for investigation and other costs in such amount as is satisfactory to the Director. *see section 6-page 27	Sec. 15.Supplier's undertaking or assurance.-(1)Where the director has reason to believe that any supplier has engaged in, or is engaging in, any deceptive or unconscionable act or practice in connection with a consumer transaction, the director, (a) instead of ordering an investigation of the supplier under this Act or taking proceedings against the supplier under this Act; and (b) if he is satisfied that the supplier has ceased engaging in such acts or practices may accept from the supplier a written undertaking or assurance in such form and containing such terms and conditions as the director may determine, and, without limiting the generality of the foregoing, such undertaking or assurance may include any or all of the following terms and conditions: (c) An undertaking to comply with the requirements of this Act and the regulations (d) An undertaking to refrain from engaging in such acts or practices;	*10.(1) Where (a) a supplier has engaged in or has been engaging in an unfair act or practice, and (b) that supplier has satisfied the Director that he has ceased engaging in that act or practice that supplier may enter into an undertaking with the Director in such form and containing such provisions as the Director, upon negotiation with that supplier, considers proper and without restricting the generality of the foregoing, the undertaking may contain specific undertakings by the supplier (c) to refrain from engaging in those acts or practices that were unfair, and (d) to redress those consumers who suffered damage or loss due to those unfair acts or practices. (2) Anytime after a supplier enters into an undertaking he may request the Director to vary or terminate that undertaking and upon considering the request the Director may vary or terminate that undertaking.	

(e) An undertaking to reimburse to the consumers or class of consumers designated in the undertaking any money, property, or other thing received from them in connection with a consumer transaction, including money necessarily expended in the course of making and pursuing a complaint;

(f) An undertaking that consumer transactions involving the supplier and the consumers or class of consumers designated in the undertaking will be carried out by the supplier in accordance with terms and conditions specified in the undertaking;

(g) An undertaking to furnish a bond in accordance with the Security Bonding Act;

(h) An undertaking to reimburse to the director the costs of any investigation, as certified by the minister;

(3) Notwithstanding subsection (2), any time after a supplier has entered into an undertaking he may apply to a court by way of originating notice for an order

(a) terminating that undertaking, where the court is satisfied that the act or practices that the supplier undertook to refrain from engaging in was not unfair, or

(b) varying the provisions of that undertaking, where the court is satisfied that the circumstances warrant varying the provisions of that undertaking.

(4) Where an undertaking is terminated or varied under this section, that termination or variance does not invalidate anything done under that undertaking prior to the termination or variance of that undertaking

(5) The Director shall maintain a public record of all undertakings entered into under this section

*see infra-re: s.18.1 authorization of Attorney General

(i) Requirements for the form, content, and maintenance of trust accounts, records, contracts, advertisements, or other documents or papers, respecting consumer transactions engaged in by the supplier.

(2) Where
(a) an investigation of a supplier has been ordered under section 9; or
(b) enforcement proceedings have been instituted by the director under section 16,
the director may terminate the investigation or proceeding upon the acceptance of a written undertaking or assurance from the supplier under subsection (1).

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ORDER TO CEASE UNFAIR PRACTICE; PROHIBITION ORDER

Sec. 6 Order to cease unfair practice.-(1) Where the Director believes on reasonable and probable grounds that any person is engaging or has engaged in an unfair practice, the Director may order such person to comply with section 3 in respect of the unfair practice specified in the order.

(2) Notice of proposal.- Where the Director proposes to make an order under subsection 1, he shall serve notice of his proposal on each person to be named in the order together with written reasons therefor.

(3) Request for hearing.- A notice under subsection 1 shall inform each person to be named in the order that he is entitled to a hearing by the Tribunal* if he mails or delivers within fifteen days after the notice under subsection 2 is served on him notice in writing requiring a hearing to the Director and the Tribunal and he may so require such a hearing

30.(1)Where a person has been convicted of an offence under Part V

(a) the court may at the time of such conviction, on the application of the Attorney General of Canada or the attorney general of the province, or

(b) a superior court of criminal jurisdiction in the province may at any time within three years thereafter upon proceedings commenced by information of the Attorney General or the attorney general of the province for the purposes of this section,

and in addition to any other penalty imposed on the person convicted, prohibit the continuation or repetition of the offence or the doing of any act or thing by the person convicted or any other person directed toward the continuation or repetition of the offence and where the conviction is with respect to a merger or monopoly, direct the person convicted or any other person to do such acts or things as may be necessary to dissolve the merger or monopoly in such manner as the court directs.

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(4)Failure to request hearing.-Where a person upon whom a notice is served under subsection 2 does not require a hearing by the Tribunal in accordance with subsection 3, the Director may carry out the proposal stated in the notice.

(5)Hearing.-Where a person requires a hearing by the Tribunal in accordance with subsection 3, the Tribunal shall appoint a time for and hold the hearing and, on the application of the Director at the hearing, may by order direct the Director to carry out his proposal or to refrain from carrying out his proposal and to take such action as the Tribunal considers the Director ought to take in accordance with this Act and the regulations and for such purposes the Tribunal may substitute its opinion for that of the Director.

*see section 1(j) - Tribunal means The Commercial Registration Appeal Tribunal.

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(2)Where it appears to a superior court of criminal jurisdiction in proceedings commenced by information of the Attorney General of Canada or the attorney general of the province for the purposes of this section that a person has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under Part V, the court may prohibit the commission of the offence or the doing or continuation of any act or thing by that person or any other person constituting or directed toward the commission of such an offence.

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(6)Conditions.-The Tribunal may attach such terms and conditions to its order as it considers proper to give effect to the purposes of this Act.

(7)Parties.-The Director and the person who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

ORDER FOR IMMEDIATE COMPLIANCE

Sec. 7 Order for immediate compliance.-(1)Notwithstanding section 6, the Director may make an order under subsection 1 of section 6 to take effect immediately where, in his opinion, to do so is necessary for the protection of the public and, subject to subsection 3, the order takes effect immediately.

(2)Notice of order.-Where the Director makes an order under subsection 1, he shall serve each person named in the order with a copy of the order togetner with written reasons therefor and a notice containing the information required to be in a notice referred to in subsections 2 and 3 of section 6.

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(3)The Attorney General or any person against whom an order of prohibition or dissolution is made may appeal against the order or a refusal to make an order or the quashing of an order

(a) from a superior court of criminal jurisdiction in the province to the court of appeal of the province

(b) from the Federal Court - Trial Division to the Federal Court of Appeal, and

(c) from the court of appeal of the province or the Federal Court of Appeal to the Supreme Court of Canada

as the case may be, upon any ground that involves a question of law or if leave to appeal is granted by the court appealed to within twenty-one days after the judgment appealed from is pronounced or within such extended time as the court appealed to or a judge thereof for special reasons allows, on any ground that appears to that court to be a sufficient ground of appeal.

(4)Where the court of appeal or the Supreme Court of Canada allows an appeal it may quash any order made by the court appealed from, and may make any order that in its opinion the court appealed from could and should have made.

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(3) Hearing.-Where a person named in the order requires a hearing by the Tribunal in accordance with the notice under subsection 2, the Tribunal shall appoint a time for and hold the hearing and may confirm or set aside the order or exercise such powers as may be exercised in a proceeding under section 6.

(4)Expiration of order.-Where a hearing by the Tribunal is required, the order expires fifteen days after the giving of the notice requiring the hearing but, where the hearing is commenced before the expiration of the order, the Tribunal may extend the time of expiration until the hearing is concluded.

(5)Parties.-The Director and the person who has required the hearing and such other persons having a direct interest in the order as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

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(6)A court may punish any person who contravenes or fails to comply with a prohibition or direction made or given by it under this section by a fine in the discretion of the court, or by imprisonment for a term not exceeding two years.

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ORDER REQUIRING PUBLICITY TO RELIEF GRANTED

c.f. s.16

16.(1)Where the court grants relief under section 11, 12 or 14, the court may make a further order requiring the supplier to advertise to the public particulars of any order, judgment or other relief granted by the court.

(2)In making an order under subsection (1), the court may prescribe

(a) the methods of making the advertisement so that it will assure prompt and reasonable communication to consumers;

(b) the content or form or both of the advertisement;

(c) the number of times the advertisement is to be made;

(d) such other conditions as the court considers proper.

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STAY	Sec.8 Stay.-Notwithstanding that, under section 9b of The Ministry of Consumer and Commercial Relations Act, an appeal is taken from an order of the Tribunal made under section 6 or 7, the order takes effect immediately but the Tribunal may grant a stay until the disposition of the appeal.	Sec.18 No Staying of certain orders.-Not withstanding any other Act, an appeal to the Court of Appeal does not stay an interim or permanent order or injunction made under section 16(1)(b), or any other order made under this Act.		

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SUBMISSION OF INFORMATION SUBSEQUENT TO SENTENCE

31.(1)Notwithstanding anything contained in Part V, where any person is convicted of an offence under Part V, the court before whom such person was convicted and sentenced may, from time to time within three years thereafter, require the convicted person to submit such information with respect to the business of such person as the court deems advisable, and without restricting the generality of the foregoing the court may require a full disclosure of all transactions, operations or activities since the date of the offence under or with respect to any contracts, agreements or arrangements, actual or tacit that the convicted person may at any time have entered into with any other person touching or concerning the business of the person convicted.

(2)The court may punish any failure to comply with an order under this section by a fine in the discretion of the court or by imprisonment for a term not exceeding two years.

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CIVIL ACTION AT INSTANCE OF DIRECTOR AND INTERIM INJUNCTION UPON APPLICATION OF A-G	Sec.16 Actions and proceedings.-(1)The Court, in any action brought by the director or any other person whether or not that person has a special, or any, interest under this Act or the regulations, or is affected by a consumer transaction, may grant one or more of the following. (a) A declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction is a deceptive or unconscionable act or practice; (b) An interim or permanent injunction restraining a supplier from engaging or attempting to engage in a deceptive or unconscionable act or practice in respect of a consumer transaction; and thereupon may make a further order requiring the supplier to advertise to the public in the media in such a manner as will assure prompt and reasonable communication to consumers, and on such terms or conditions	*12.(1)Where the Director is of the opinion that a supplier (a) has engaged in or is engaging in an unfair act or practice, or (b) has not complied with the terms of an undertaking which that supplier has entered into, he may commence and maintain an action in a court against that supplier. (2)In action brought under subsection (1), the court may (a) make an order declaring that the act or practice is an unfair act or practice; (b) make an order requiring the supplier to provide such redress as the court considers proper to those consumers who suffered damage or loss arising out of the unfair act or practice; (c) grant an order in the nature of an injunction restraining the supplier from engaging in the unfair act or practice; (d) grant such order relief as the court considers proper. *see infra -re s. 18.1 authorization of Attorney General.	29.1(1)Where it appears to a court, on an application by or on behalf of the Attorney General of Canada or the attorney general of a province, (a) that a person named in the application has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under Part V or section 46.1, and (b) that if the offence is committed or continued (i) injury to competition that cannot adequately be remedied under any other section of this Act will result, or (ii) a person is likely to suffer, from the commission of the offence, damage for which he cannot adequately be compensated under any other section of this Act and that will be substantially greater than any damage that a person named in the application is likely to suffer from an injunction issued under this subsection in the event that it is subsequently found that an offence under Part V or section 46.1 has not been committed, was not about to be committed and was not

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as the Court considers are reasonable and just, particulars of any judgment, declaration, order, or injunction granted against such supplier under clause (a) or (b) or subsection (3).

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(3)[Damages].-In addition to any order made or relief granted under subsection (2), the court may, in an action brought under subsection (1), clause (b), award punitive or exemplary damages.

(4)[Debt to Crown].-Damages awarded under this section are a debt owing to the Crown.

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likely to be committed,

the court may, by order, issue an interim injunction forbidding any person named in the application from doing any act or thing that it appears to the court may constitute or be directed toward the commission of an offence, pending the commencement or completion of a prosecution or proceedings under sub-1 section 30(2) against the person

(2)Subject to subsection (3), at least forty-eight hours notice of an application for an injunction under subsection (1) shall be given by or on behalf of the Attorney General of Canada or the attorney general of a province, as the case may be, to each person against whom the injunction is sought.

(3)Where a court to which an application is made under subsection (1) is satisfied that

(a) subsection (2) cannot reasonably be complied with, or

(b) the urgency of the situation is such that service of notice in accordance with subsection (2) would not be in the public interest.

it may proceed with the application ex parte but any injunction issued under subsection (1), by the court on ex parte application shall have effect only for such period, not exceeding ten days, as is specified in the order.

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(4)An injunction issued under subsection (1)
(a) shall be in such terms as the court that issues it considers necessary and sufficient to meet the circumstances of the case, and
(b) subject to subsection (3), shall have effect for such period of time as is specified therein.

(5)A court that issues an injunction under subsection (1), at any time and from time to time on application by or on behalf of the Attorney General of Canada or the attorney general of a province, as the case may be, or by or on behalf of any person to whom the injunction is directed, notice of which application has been given to all other parties thereto, may by order,
(a) notwithstanding subsections (3) and (4), continue the injunction, with or without modification, for such definite period as is stated in the order, or
(b) revoke the injunction

(6)Where an injunction is issued under subsection (1). the Attorney General of Canada or the attorney general of a province, as the case may be, shall proceed as expeditiously as possible to institute and conclude any prosecution or proceedings arising out of the actions on the basis of which the injunction was issued.

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SUBSTITUTE
A.P.M.

-conduct
of pro-
ceedings

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Sec. 24 Substitute
action of director.-
(1)Where the director
is satisfied that a
consumer has
(a) a cause of action,
or
(b) a defence to an
action, or
(c) grounds for setting
aside a default
judgment, or
(d) grounds for an
appeal or to con-
test an appeal
and that it is in the
public interest, he may,
on behalf of and in the
name of the consumer,
institute proceedings
or assume the conduct
of proceedings on be-
half of the consumer
against a supplier or
defend any proceedings
brought against the
consumer by a supplier
with a view to enforcing
or protecting the rights
of the consumer re-
specting a contravention
or suspected contra-
vention by the supplier
of those rights or of
the provisions of any
enactment or law re-
lating to the protection
or interests of con-
sumers.

(3)[Conduct of proceedings]
.-In respect of proceedings
referred to in subsection
(1), the following pro-
visions apply:
(a) The director shall
on behalf of the con-
sumer, have, in all
respects, the same
rights in, and con-
trol over, the pro-
ceedings, including

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13.(1)Subject to this
section, the Director
may, where in his
opinion it is in the
public interest to
do so,
(a) commence and
maintain an
action under
section 11
where a con-
sumer has a
cause of action
under that
section, or
(b) maintain an
action under
section 11
after it has
been commenced,
or
(c) bring and main-
tain an appeal
in an action
under section 11.

(2) Where, pursuant
to subsection (1), the
Director brings or main-
tains an action or an
appeal under section 11,
he shall do so in the
name of and on behalf of
that consumer and he
shall be entitled to
take the same steps
in and have the same
control over the
action or appeal in-
cluding the right to
settle the action or
appeal or any part
thereof, as that con-
sumer would have had
in respect of that
action or appeal.

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(7)A court may punish
any person who con-
travenes or fails to
comply with an in-
junction issued by it
under subsection (1)
by a fine in the dis-
cretion of the court,
or by imprisonment for
a term not exceeding
two years.

(8) In this section
"court" means the Fed-
eral Court of Canada
or a superior court of
criminal jurisdiction
as defined in the Crim-
inal Code.

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the same right to settle an action or part of an action as the consumer would have had in the conduct of those proceedings;

(b) The Director may, without consulting or seeking the consent of the consumer, conduct the proceedings in such a manner as the director considers appropriate and proper;

(c) Any moneys, excluding costs, recovered by the director shall belong, and be paid, to the consumer without deduction, and any amount, excluding costs, awarded against the consumer shall be paid by and recoverable from the consumer; but, in every case, any costs of the proceedings awarded by the court having jurisdiction shall be borne by, or paid to and retained by the director.

ALBERTA

(5)In any action or appeal commenced, brought or maintained by the Director pursuant to subsection (1),

(a) any moneys recovered, excluding costs of the action or appeal, shall be paid to the consumer;

(b) any moneys payable by the consumer, excluding costs of the action or appeal, are not recoverable from the Director or the Government of Alberta;

(c) the costs of the action or appeal shall be paid to or borne by the Director.

(3)The Director shall not bring or maintain an action or an appeal under this section without first obtaining the written consent of the consumer in whose name the action is brought.

CANADA

ONTARIO

BRITISH COLUMBIA

ALBERTA

CANADA

-consent required

(2)[Consent of minister and consumer required].-The Director shall not institute, assume the conduct of, or defend any proceedings under subsection (1) without first,
(a) obtaining an irrevocable written consent of the consumer; and
(b) obtaining the written consent of the minister.

(4)Upon the consumer giving written consent under subsection (3), the Director may, without consulting or seeking any further consent of the consumer, conduct the action or appeal in such a manner as the Director considers appropriate and proper.

-counterclaim

(4)[Counterclaim].-Where
(a) a party to proceedings to which this section applies files a counterclaim; or
(b) the consumer on whose behalf the proceedings are being defended is entitled to file a counterclaim,
and that counterclaim
(c) is not related to the cause of action; and
(d) is not related to the interests of the consumer as a consumer,
the court having jurisdiction in the proceedings shall, on the application of the director, order
(c) that the counterclaim be heard separately; and
(f) that the consumer be made a party to the counterclaim in his own right,

(6)Nothing in this section abrogates or restricts any right of set-off that a supplier has or may have against a consumer on whose behalf the Director is acting under this section.

(7)Where the Director, while acting on behalf of a consumer under this section, releases a supplier from a liability or an obligation arising out of the cause of action, that release shall extinguish that claim to the liability or obligation referred to in that release which the consumer may have against that supplier.

and the court may make such other orders or give such directions in that behalf as it considers just.

	ONTARIO	BRITISH COLUMBIA	ALBERTA	CANADA
REGULATION & MISCELLANEOUS	Sec.16.Regulations.- (1)The Lieutenant Governor in Council may make regulations (c) subject to subsection 2, adding to the consumer representations that are deemed to be unfair practices under clause a of section 2; (d) exempting any class of person or type of consumer from this Act or the regulations or any provision thereof;	Sec. 32.Regulations.- For the purpose of carrying out the provisions of this Act according to their intent, the Lieutenant Governor in Council may make such regulations and orders as are ancillary thereto and not inconsistent therewith; and every regulation shall be deemed to be part of this Act and has the force of law; and, without restricting the generality of the foregoing, the Lieutenant Governor in Council may make regulations and orders. (c) exempting any class of supplier or type of consumer transaction from this Act or the regulations or any provision thereof; (h) respecting the matters to be determined or prescribed under section (2(3) (n) and (p), including the circumstances that a court may take into consideration in determining whether or not a supplier has engaged in a deceptive act or practice; (j) defining, for the purpose of this Act and the regulations, any words or expressions not defined in this Act;	Sec.21[Regulations].- The Lieutenant Governor in Council may make regulations (a) prescribing information that must be part of a representation made by a supplier or class thereof in respect of any consumer transaction or class thereof; (c) exempting any class of consumer transaction from the operation of all or any of the provisions of this Act; (d) generally respecting any other matter necessary for carrying out the purpose and intent of this Act	

(k) defining, for the purpose of this Act, the meaning of any words, expressions, or representations used in the promotion or advertisement of the subject of a consumer transaction.

(kl) prescribing, in respect of any class of supplier, the form and content of any form of contract, notice, or other document to be used in consumer transactions;

(l) prescribing the practice and procedure in the conduct of investigations under sections 8, 9, and 11;

(m) respecting the establishment of the Consumer Advancement Fund under section 30 and payments into, or out of, the Fund.

(n) prescribing, for the purpose of section 2, acts or practices that are deceptive;

(o)*prescribing, for the purpose of section 3, the circumstances to be considered by the Court in determining whether an act or practice is unconscionable;

(p) restricting the application of this Act to any class of supplier or type of consumer transaction; and

(q) respecting any other matter necessary or advisable to carry out effectively the intent and purpose of this Act.

Sec.18.1 [Authorization of Attorney General].-(1)The Director shall not, until he has been authorized to do so by the Attorney General,

(a) make an application under section 7 or 9, or

(b) enter into an undertaking under section 10, or

(c) commence or maintain an action under section 11 or 12.

(2)[Representation of Director].-The Attorney General may designate counsel to represent the Director in any application to be made or action to be commenced or maintained by the Director under this Act.

AUSTRALIA TRADE PRACTICES ACT 1974

The scheme of this Act is similar to the Combines Investigation Act in that it contains provisions covering combines, monopolization, exclusive dealing, retail price maintenance, price discrimination and anti-competitive mergers as well as covering deceptive trade practices. Prohibitions against unfair practices are contained in Division I of Part V of the Trade Practices Act 1974.

Division II of Part V sets out consumer conditions and warranties which are similar to those contained in provincial Sales of Goods Acts.

The Trade Practices Commission is given the role of enforcement of the Division I provisions as well as being specifically required to examine critically consumer protection laws referred to it by the Attorney General of Canada and to provide information and to conduct research concerning consumer interests (section 28(1)).

Section 52 contains a broad general prohibition against engaging in conduct in trade and commerce that is misleading or deceptive. A breach of this section gives rise to an injunction only (section 79).

Section 53 enumerates specific examples of such conduct involving misrepresentations as to standards, quality or grade, past history of the product, sponsorship, performance characteristics, price reductions, the need for goods, repairs, etc., and the existence or effect of any warranty or guarantee.

This Division also contains specific prohibitions against deceptive offering of prizes (section 54); bait advertising (section 56); referral selling (section 57); accepting payment without intending to supply as ordered (section 58); coercion or undue harassment at place of

residence (section 60) and pyramid selling schemes (section 61). Sections 62 and 63 prohibit supplying goods which do not conform to prescribed safety and information standards. Detailed provisions in respect of the liability of senders and receivers of unsolicited goods are set out in section 65.

Section 55 prohibits conduct covered by the Convention for the Protection of Industrial Property, that is to say conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods. This section is not operative until the Convention enters into force for Australia (section 2(2)).

Contravention of Part V (other than the general section 52) is punishable on conviction by a maximum fee of $10,000 or six months imprisonment for an individual or, for a corporation, a fine of $50,000. Where intent need be proved in any proceeding, proof of that intent by a servant or agent of the corporation shall be deemed proof of intent by the corporation (section 84).

However, a defendant is provided with a due diligence where he can establish that the contravention was due to a mistake, to reliance on information supplied by a third person, to the act or default of a third person or to a cause beyond his control and that he exercised due diligence to avoid the contravention (section 85(1)). Section 85(3) provides a defence for an innocent publisher of an advertisement.

Section 86 confers exclusive jurisdiction on the Superior Court of Australia.*

The Attorney General or any other person is empowered by section 80(1) to apply to a court for an injunction for a contravention of the above noted prohibitions. A person who suffers loss or damages as a result of the contraventions of a Part V provision can recover damages from the convicted party (section 82) and may apply to the Attorney General for legal and financial assistance in respect of his action for damages (section 170).

*Pending the establishment of the Superior Court of Australia, the Australian Industrial Court has exclusive jurisdiction (section 168).

UNITED KINGDOM FAIR TRADING ACT 1973

The Fair Trading Act 1973 contains provisions respecting mergers, monopolies and combines as well as provisions respecting consumer protection which are of a broader nature than those found in the Trade Descriptions Act 1968. The Fair Trading Act 1973 does not set out specific prohibitions but provides a mechanism for a broad review of the economic interests of consumers. The Act creates the office of the Director General of Fair Trading who is given a mandate to review the supply of goods and services to consumers and to receive and collect evidence regarding practices which may adversely affect consumers. The scope of these practices is defined in section 13 and include: the terms and conditions of supply, the manner in which such terms are communicated to the consumer, promotion techniques, methods of salesmanship and the manner of packaging and collection of payment.

The Act also creates the Consumer Protection Advisory Committee (section3). The Director is empowered to make a reference to the Committee where it appears that a consumer trade practice has or is likely to have the effect of misleading or withholding adequate information from consumers as to their rights and obligations, of misleading consumers in any other manner or of subjecting consumers to undue pressure or unconscionable terms or conditions (section 17). Where the Committee agrees with the proposals of the Director, a report is prepared for consideration by the Secretary of State who has power to make an order by statutory instrument which must be approved by resolution of each House of Parliament (section 22). Section 23 provides for penalties for non-compliance with the order and section 27 gives the responsibility for enforcement to the local weights and measures authorities. Section 25 sets out the same "due diligence" defences as in the Trade Descriptions Act 1968.

Part III of the Act gives the Director additional powers in respect of persons who persist in a course of conduct which is detrimental to the interests of consumers or is unfair to consumers. i.e. section 34 defines such conduct as consisting of contraventions of enactments, imposing duties, prohibitions or criminal restrictions or consisting

of a breach of conduct or a breach of legal duty. In such cases, where the Director is unable to obtain an assurance of voluntary compliance or where the assurance is not being observed, the Director is empowered by section 35 to institute proceedings before the Restrictive Practices Court which may make a "cease & desist" order where it appears that the defendant is not prepared to give an acceptable undertaking to the court about his future business conduct.

UNITED KINGDOM TRADE DESCRIPTIONS ACT 1968

This Act is basically a consolidation and updating of the criminal law relating to trade descriptions previously found in the old Merchandise Marks Act 1887. The prohibitions contained in the Act are not limited to transactions with the public, but cover all levels in the distribution chain. The main prohibition (section 1) covers an extraordinary wide gambit of activities and prohibits any person, in the course of a trade or business, from applying a false or misleading trade description to goods or from supplying goods to which a false or misleading trade description has been applied.

What constitutes a trade description is enumerated in section 2 and is wide enough to include all indications as to the physical properties of the goods as well as tests, endorsements, history, etc. Such trade descriptions must be false to a material degree. However, section 3 further widens the scope of the prohibition by extending the definition to include any misleading trade descriptions or false indications that is likely to be taken for a false trade description, where such description or indication is false to a material degree.

The actual application of the trade description incorporates the act of affixing it to goods and their containers as well as using the trade description "in any manner likely to be taken as referring to the goods". Oral representations are specifically included as well as advertisements containing trade descriptions used in relation to any class of goods, where the form, content, timing, frequency of the advertisements leads purchasers to think that the advertisement did relate to that class of goods.

The prohibition against false indications as to price reductions (section 11) from the trader's previous price is defined so as to refer to a price charged by the trader for a continuous period of twenty eight days within the preceding six months, unless the contrary is specifically stated. Indications of reductions from the recommended price are deemed unless the contrary is expressly stated, to refer to a price recommended by the manufacturer generally for supply by retail in the area where the goods are offered.

In respect of services, section 14 provides that certain negligent or knowingly false statements made in the course of any trade or business regarding services accommodations or facilities are an offence. Again the scope of the prohibition is defined by means of an enumeration covering such matters as the provision, nature, and approval of the services, etc. As with trade descriptions in respect of goods, anything not amounting to an actual statement about the enumerated matters, but which is likely to be taken for such a statement is deemed to be a false statement.

Administrative authority to define expressions used in connection with goods and services is given to the Board of Trade by section 7 and section 15. Further the Board of Trade is empowered (under section 8) to order that mandatory information and instruction accompany goods. Section 9 enables the Board of Trade to require mandatory information in advertisement. The Board of Trade is required to consult with interested organizations and no order can be made without giving such organizations 28 days notice.

Prosecutions under the Act can be by way of summary conviction or indictment; on summary conviction the maximum fine is £400 - on indictment a fine or imprisonment or both.

The Trade Descriptions Act 1968 provides a due diligence defence where the accused can also prove that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident, or some other cause beyond his control (section 24). A defence for innocent publication of an advertisement is also provided (section 25). Directors and managers of corporations can be found guilty of an offence committed with their consent, connivance or negligence.

The local weights and measures authority are required to enforce the provisions of the Act and when directed to do so, report to the Board of Trade, which also has authority to inquire into improper discharge of responsibilities by the local weights and measures authorities.

FEDERAL TRADE COMMISSION (U.S.) PROTECTION - AN ADMINISTRATIVE PROCESS

In the execution of its responsibilities under section 5 of the Federal Trade Commission Act, the Commission utilizes both guidance activity and procedural remedies.

The Commission derives its regulatory powers over advertising from section 5 of the Federal Trade Commission Act. Three requirements must be met before the Commission may issue an order prescribing acts or practices alleged to be in violation of this section. First, the act or practice complained of must be an "unfair method of competition, or an unfair or deceptive act or practice" within the meaning of the Act. Secondly, the act or practice must be in "interstate" commerce. Finally, the act or practice must be of sufficient magnitude to warrant Commission action in the "public interest". Failure of the Commission to meet the above requirements will result in the dismissal of the matter upon appeal.

Through its guidance activities, the Commission seeks to encourage voluntary co-operation and corrective measures on behalf of organizations without the Commission's resorting to legal action. For example, the FTC may issue industry guides, trade regulation rules, advisory opinions, or policy statements disseminated through press releases. In addition, the Commission periodically holds public hearings during which interested parties, including members of the public, are invited to express their views on various practices within a particular industry. The information obtained from such hearings is then utilized by the Commission in determining the necessity for further action.

Where investigations have disclosed that individuals or corporations may be engaged in deceptive acts or practices in specific instances, the Commission utilizes one of three procedural remedies. The first of these remedies is the assurance of voluntary compliance, formerly termed a "stipulation". If an investigation reveals that a proposed respondent has been engaged in deceptive activity and has already discontinued the practice or is expected to shortly discontinue the practice with the termination of his present advertising campaign the matter may be disposed by means of an assurance. Use of the assurance as a method of dispo-

sition of a matter depends upon the good faith of the proposed respondent and to a greater degree upon whether the public interest will be protected by the assurance. Although assurances contain promises that the proposed respondents will not engage in the questioned activities in the future, they do not usually contain admissions that the questioned practices amounted to a violation of the Federal Trade Commission Act.

The second remedy is the consent order. If an investigation has revealed practices which may violate the Act, and the public interest would not be protected by the acceptance of an assurance from the proposed respondent, the matter is settled by the formal complaint procedure. In the event the proposed respondent desires to avoid litigation, he may execute a consent order. Such an order contains a prohibition against participation by the respondent in the practices enumerated in the order, but does not contain an admission that the questioned practices violated the Act. Provision for "corrective" advertising has, on several occasions, been negotiated. The Commission then issues its complaint against the respondent, accompanied by the executed consent order which becomes a final order at that time. Violation of the order subjects the violator to the penalties provided by the Act.

The third remedy is the litigated order. In the formal complaint procedure, if the proposed respondent disputes the Commission's allegations and refuses to execute a consent order, litigation of the matter results. The case is then tried before a hearing examiner. Appeal may then be taken to the Commission either by the respondent or the Commission's counsel. After a hearing before the five-member Commission, the respondent may then appeal an adverse decision to the circuit court of appeals. Further appeal may be taken either by the respondent or the Commission to the Supreme Court. Only after appeal through the judicial process has been exhausted does the Commission's order become final, and only in this manner are particular activities adjudged to violate the Act.

The broad section 5 congressional mandate also gives the Commission power to declare unsubstantiated advertisements to be unfair and deceptive acts within the meaning of section 5. The F.T.C.'s advertising substantiation program requires advertisers upon F.T.C. demand to

submit all tests, studies or other data existing prior to the dissemination of the ad purporting to substantiate any claims, statements, or representations made regarding the safety, performance, efficacy, or comparative price of the product advertised. This information, with the exception of trade secrets, customer lists and other privileged or confidential financial information, becomes part of the public record. If the submitted documentation is not satisfactory, action may be taken by the F.T.C. to initiate complaint proceedings, or to have the ad withdrawn and corrective advertising ordered.

AMENDMENTS TO FEDERAL TRADE COMMISSION RULES OF PRACTICE & PROCEDURE

In January, 1975, the U.S. Congress passed the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act which affected the Commission's practice in all its activities-from initial investigation to Supreme Court agrument. Aside from extending Federal Trade Commission commerce jurisdiction to "affecting" commerce, expanding investigative authority, providing authority for self-representation in civil proceedings and producing consumer product warranty legislation, the Act provided for revision in areas such as rulemaking, civil penalties for knowing violations, and consumer redress.

The Act confers specific authority on the Federal Trade Commission to issue trade regulation rules defining unfair or deceptive acts or practices. The Commission previously had quasi-legislative power to write specific standards of conduct under section 5 of the Federal Trade Commission Act. The Magnuson-Moss Act provides a basic notice-and-comment rulemaking power in accordance with the Administrative Procedure Act and also for a required informal hearing. It allows the Commission to group together persons interested in the proceedings who have similar interests for the purpose of facilitating cross-examination. Finally, the Act provides for judicial review of Trade Regulation Rules in accordance with the Administrative Procedure Act.

With respect to civil penalties for knowing violations, the Commission may now seek civil pealties in U.S. District Court from any person, partnership, or corporation which engages in an unfair or deceptive act or practice with respect to which the Commission has issued a final cease and desist order - whether or not the person, partnership, or corporation is subject to the order - provided the act or practice was done with actual knowledge that the act or practice was unfair or deceptive and violates section 5. In addition for the first time, civil penalties - $10,000 per violation or per day - will now be available as a sanction for violations of Trade Regulation Rules provided only that the respondent has actual or constructive knowledge.

With respect to consumer redress, the Commission may sue in federal or state court on behalf of those subjected to unfair or deceptive acts or practices which led to a cease and desist order against the violator and which a reasonable man would know to be dishonest or fraudulent. Redress also lies for violation of any Trade Regulation Rule, but in respect of such violation nó dishonest or fraudulent standard is imposed. The type of relief available is in the court's discretion and includes damages, recision or reformation of contracts, refund of money or return of property but cannot be extended to include exemplary or punitive damages.

STATE LEGISLATION TO COMBAT UNFAIR TRADE PRACTICES

Forty-eight states have enacted laws more or less like the Federal Trade Commission Act to prevent deceptive and unfair trade practices.

This revision is to reflect recent enactment of such legislation by Georgia, Mississippi, Nebraska, and West Virginia.

In the two states not having such laws, Alabama and Tennessee, consumer complaint clearinghouses have been established to facilitate the taking of action under existing laws, and possibly to recommend new legislation.

To aid states in drafting legislation to prevent deceptive and unfair trade practices, the Federal Trade Commission has set forth three alternate forms of coverage:

Alternate Form No. 1

Utilizes broad language from Section 5 of the Federal Trade Commission Act to prevent "unfair methods of competition and unfair or deceptive acts or practices" in trade or commerce.

14 States

Alaska, Connecticut, Florida, Hawaii, Illinois, Louisiana, Maine, Massachusetts, Montana, North Carolina, South Carolina, Vermont, Washington, and Wisconsin.

Alternate Form No. 2

Reaches all forms of deceptive trade practices

14 States

Arizona, Arkansas, California, Delaware, Iowa, Kansas, Kentucky, Maryland, Minnesota, Missouri, New Jersey, New York, North Dakora, and West Virginia.

Alternate Form No. 3

Itemizes deceptive practices, usually with a "catch-all" clause to reach other forms of deception

17 States

Colorado, Georgia, Idaho, Indiana, Michigan, Mississippi, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Virginia, and Wyoming.

The Uniform Consumer Sales Practices Act, developed by the National Conference of Commissioners on Uniform State Laws, is:

Similar in deceptive practice coverage to Alternate Form No. 3 above, but extends also to unconscionable consumer sales practices. It or a variation of it has been adopted in

3 States

Ohio, Utah, and Nebraska.

The forty-eight state laws mentioned above typically contain authorization for the administering or enforcement official to conduct investigations and to issue cease and desist orders or obtain court injunctions to half the use of deceptive or unfair trade practices.

Restitution may be ovtained by the administering or enforcement official on behalf of aggrieved consumers in

40 States

Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

Civil Penalties for an initial violation may be assessed in

23 States

Alaska, Arizona, California, Connecticut, Georgia, Hawaii, Kansas, Kentucky, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, South Carolina, South Dakota, Texas, Vermont, Washington, and Wisconsin.

Class Actions by consumers are authorized in

15 States

Alaska, California, Connecticut, Indiana, Kansas, Massachusetts, Missouri, New Hampshire, New York, Ohio, Oregon, Rhode Island, Texas, Utah, and Wyoming.

Private Actions by consumers, sometimes including minimum recovery of $100 or $200, sometimes including double, treble or punitive damages, and usually including costs and attorney fees, are authorized in:

38 States

Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

Rules and Regulations

Authority for issuance of rules and regulations to implement deceptive, unfair or unconscionable trade practices statutes is contained in the laws of

28 States

Alaska, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wisconsin.

Rule-Making Authority varies from state to state. It is vested in the attorney general, with the following exceptions:

Wisconsin - Department of Agriculture
Montana and Utah - Department of Business Regulation
Minnesota and Ohio - Department of Commerce
Connecticut - Department of Consumer Protection
Florida - Department of Legal Affairs (attorney general), with concurrence of a majority of the Cabinet
Louisiana - Director of Consumer Protection in the Governor's Office, with the concurrence of the Attorney General and the Consumer Advisory Board
Delaware, Georgia, Hawaii - Similar to Louisiana.

Enforcement of deceptive and unfair trade practices laws through court action is vested in the Attorney General, with the following provisions and exceptions:

Arizona, California, Colorado, Florida, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Nebraska, New Mexico, Oregon, South Carolina, South Dakota, Texas, Virginia, and Wisconsin)District, county or city attorneys share enforcement responsibility with Attorney General

Louisiana - Attorney General shares enforcement responsibility with the director of consumer protection in the Governor's Office and the district attorneys.

Connecticut - Department of Consumer Protection or the Attorney General
Ohio and Utah - Department of Commerce or the Attorney General or the county attorneys
Montana - Department of Business Regulation or

the county attorneys
Nevada - Department of Commerce, Attorney General or the district attorneys
Hawaii - Director of consumer protection in the Governor's Office

Office of Public Information
Federal Trade Commission
Washington, D.C. 20580

Appendix B

ADVERTISING, COMPETITION AND THE ECONOMY: A SURVEY

H.J. Wilton-Siegel

TABLE OF CONTENTS

INTRODUCTION

Economists have not, until recently, had a great deal to say about the economics of advertising. In part, no doubt, this can be attributed to a concern for grander problems of macro-economic analysis and market theory in which advertising apparently played only a supporting role. But there is little doubt that advertising also poses a problem which classical economists find difficult to answer.

Classical demand theory presupposes a world of goods available to a typical consumer. Subject to his budgetary constraint, the consumer allocates his expenditures among such goods so as to equate marginal utilities per dollar of expenditure in order to maximize his expected utility. But this analysis assumes as a fundamental tenet of demand theory that consumers face the allocation decision with perfect knowledge. Absent complete information on the part of the consumer and the theory must be reformulated or replaced. The understanding that consumers may not possess complete information, indeed that constant learning is a feature of buying behavior has led economists to question the validity of utility theory. As recent studies of advertising have stressed its informational role or suggested that the consumer approaches the maximization process with a moulded set of choices, this research has reinforced the modern skepticism regarding classical demand theory.

This paper represents a survey of the literature to date on the economics of advertising. The framework is largely but not entirely that of utility theory and classical economics. As such it often operates on two levels. To the extent that criticism of theoretical models and empirical studies are made within the traditional set of postulates, it seeks to explain the debate and to define the prevailing consensus. However, the essay also considers several theories of advertising which are either based upon or imply a theory of consumer demand which denies accepted utility theory and negates many of the appealing logical deductions yielded by demand theory.

The essay is divided into several sections. After stating a few qualifications and providing an initial perspective, the logical next step is a consideration of the aggregate effects of advertising. The following section concentrates on particular macro-economic aspects of advertising.

Economic analyses are concerned with two separate markets - the market for advertising messages, in which advertisers participate in the demand side and the media act as suppliers, and the markets for advertised products, in which advertisers are suppliers and the ultimate consumers present the demand. The third section of the paper considers the market for advertising messages. The fifth section is then concerned with the question of central importance for economists - whether advertising is an inherently anti-competitive influence in the markets for advertised products. The third and fifth sections are however separated by a transitional section which examines the causal relationship between advertising and consumer demand. The sixth section considers briefly a few arguments raised as justifications for any anti-competitive influence which advertising may exhibit. Finally, the last section summarizes the paper and offers a few reflections on various proposals for reform in the light of the conclusions of this study.

I PERSPECTIVE AND QUALIFICATIONS

It is perhaps appropriate to begin with a workable definition of advertising and a few statistics. For a definition we can use that provided by Colley (13):

> ...mass paid communications, the alternate purpose of which is to impart information, develop attitudes and induce action beneficial to the advertiser (generally the sale of a product or service).

Advertising is to be distinguished from other forms of promotional selling such as produce design, model changes, packaging, service, and even performance. Which form of sell ing technique is emphasized depends very much upon the nature of the industry, the product and institutional constraints. It is beyond the scope of this paper to consider other forms of intensive selling but it should be noted for policy purposes that to some degree, as Doyle (20) suggests, such techniques are substitutes for advertising.

Broadly, all advertisements fall within one of three categories:

1. advertising of the identity of buyers or sellers;
2. price advertising;
3. quality advertising.

Classified ads and mail campaigns concentrate on conveying information regarding the identity of sellers and the prevailing price. Television ads not only stress the identity of sellers but also attempt to impress the viewer with the quality or particular attributes of the good. It is hard to challenge the proposition that the typical advertisement for a consumer at least communicates:

- the name of the product
- the use of the product
- the fact of availability of the product
- the identity of the seller
- the fact that the product is advertised

though such advertisements may rarely give the price and even more rarely communicate much else. A major question which runs through much economic literature is whether the role of

advertising is to be understood in terms of its information-dispersing role. Undoubtedly consumers demand information. However it is suggested in this paper that national consumer advertising is best understood in terms of its non-informational functions.

For statistics Doyle (20) has stated that advertising in 1960 constituted 2.7 per cent of consumer expenditure in the United Kingdom and 3. 7 per cent in the United States. Johnson (41) cites a figure of 2.5 per cent of consumer expenditure for Canada in 1961. While statistics are not readily at hand it seems clear that the bulk of advertising is conducted by manufacturers of consumer products. Indeed, much of the literature implicitly assumes that different economic consequences might obtain if one were to concentrate upon advertising at the distribution stage (see for example Kaldor (42)).

An enquiry into the economics of advertising by manufacturers, then, be conceived in one of two ways:

1. as an exercise in positive economic outlining the factors which determine the present scale of expenditures on advertising in various industries;

2. as an examination of the effects of advertising upon the allocation of resources i.e. as an exercise in welfare economics.

For the most part this paper is concerned with the former. However, it also examines the allocative implications of a policy designed to restrict or totally abolish consumer advertising.

Finally some limitations of the study should be noted. First, it does not deal explicitly with fraudulent, patently misleading or deceptive advertisements. Until recently this has not been an aspect of the field which has attracted the attention of economists. Secondly, it is primarily concerned with advertising of established products. Borden (10) in his seminal study of advertising concluded:

> Study of demand for a wide range of products leads to the conclusion that basic trends of demand for products are determined primarily by underlying social and environmental conditions, and that adver-

tising by itself serves not so much to increase demand for a product as to speed up the expansion of demand that should come from favourable conditions, or to retard adverse demand trends due to unfavourable conditions.

There is little reason to doubt that advertising in relation to newly-introduced products does serve to speed up demand. However, economists have traditionally abstracted from the case of new products and dealt with the influence of advertising in relation to established products in established industries.

Finally the author does not claim to have conducted a complete survey of the available literature. This paper represents no more than an attempt to organize and summarize the more important contributions to the professional literature over the past 35 years.

II AGGREGATE EFFECTS

At the aggregate level of economic analysis, one might pose three questions for further examination:

1. does advertising affect employment and/or aggregate demand?
2. does advertising influence the level of demand for goods between industries?
3. does advertising cause inflation?

As regards the inflationary impact of advertising, it does not appear that any judgment can be rendered on this possible effect at the aggregate level. The discussion is more properly postponed to a later section in which the intra-industry effects - particularly the oligopolistic effects - of advertising are considered. As market structures (and the role of advertising within such markets) vary across industries, whatever inflationary impact advertising may exhibit is best understood as the summation of unevenly distributed influences operating in specific sectors of the economy. Accordingly, further attention is focussed on the first and second problems in that order.

The discussion of the effects of advertising upon aggregate demand and employment is more properly subdivided into a consideration of two subsidiary problems.

First, one must consider whether advertising influences the distribution of consumer disposable income between spending and savings - i.e. the average propensity to consume. Galbraith (32) (33) (35) has argued that the extensive use of advertising made by large corporate units in response to the economic conditions of the new industrial state has encouraged an increased consumption:income ratio across the economy. As Solow (70) puts the argument:

> . . . Galbraith believes that in the absence of persuasion, reduced to their already satiated biological needs for guidance, consumers would be at a loss;total consumer spending would fall and savings would simply pile up by default.

The hypothesis has been tested twice with conflicting

results. Taylor and Weiserbs (80), using a Houtthaker-Taylor stock adjustment model, found some evidence in favour of Galbraith's proposition. They conclude, rather reluctantly it would seem:

> Based on an analysis of advertising expenditures in the aggregate our results suggest that advertising does in fact tend to increase consumption at the expense of saving. But as to what the causal mechanism underlying this is, we unfortunately cannot say. It may be that advertising actually succeeds in altering tastes a la Galbraith, but then again it may be that advertising is simply serving to bring new goods and services to the attention of consumers.

Taylor and Weiserbs themselves, suggest some limitations to their study;specifically, they note that reliance on aggregate date may imply that their results suggest nothing more than errors of aggregation. Moreover they note that the results suggest that the causal relationship between advertising and consumption is not undirectional but rather simultaneous.

The latter finding is substantiated by Schmalensee (65) who found no real evidence of any influence of advertising on either aggregate total consumption or aggregate consumption of goods. Schmalensee estimated equations for consumption using advertising as an explanatory variable. He then examined the coefficients for the advertising variable and to statistics as advertising date for the previous, present and subsequent periods were used. He found that subsequent advertising data provided the best explanation of consumption suggesting that advertising adjusted to sales, not sales to advertising. In addition, he found that quarter-to-quarter variations in total national advertising expenditures in major media could be explained by consumer spending on durables and non-durables again suggesting that advertising responds to sales rather than influences consumption.

On a casual basis, Solow (72) doubts the Galbraith preposition:

> It is open to legitimate doubt that advertising has any detectable effect at all on the sum total of consumer spending, or, in other words, on the choice

between spending and saving.

Kaldor (42) in his classic essay, also doubted both the proposition that the consumption:income ratio had been altered and the possibility that any proof could be sustained.

A second question, which has lost economic appeal lately, is whether advertising acts as a stabilizing force in the economy thereby promoting high employment. The contention was convincingly disposed of by Kaldor (42). He notes that even if advertising operated to raise the consumption:income ratio there is no indication that advertising sets in motion a multiplier process necessary for economic regulation. Moreover advertising has a tendency, along with other selling costs and private investment, to vary positively with general economic activity and to that extent accentuates rather than counteracts economic fluctuations. Finally, he notes that any justification of advertising as an employment-creating force must, in a world of economic regulation targeted towards full employment, involve an examination of the welfare effects of alternative policies designed to meet the same end:

> This means that in investigation the effects of advertising on employment the question to be examined is not whether advertising stimulates employment as such, but whether as a method of increasing employment it is better or worse than other methods. It is by no means clear that advertising is to be considered preferable to subsidy programs, unemployment insurance plans, and employment projects as a means of stabilizing employment.

It is clearly difficult to define conclusions in respect of the effect of advertising on aggregate demand and on employment. The second question - whether advertising has an allocative function between industries rather than merely among brands within a particular industry - is almost as unresolved. And, if such a shift occurs, as Kaldor (42) notes, it is clearly impossible to assess the welfare implications on consumers of such a shift using traditional economic analysis.

This interindustry effect has been examined in two studies. Comanor and Wilson (16) estimated demand functions from time series data for 28 industries including as explan-

atory variables the traditional variables of price and income, a state variable and a variable representing advertising. They found that advertising almost never had a negative affect on demand and was more frequently significant than the price variable. They also noted the significance of the relative elasticities:

> Although the elasticity of sales response to changes in advertising is typically less than the elasticity with respect to price changes, the magnitude of the effect of an increase of one percentage point in the advertising:sales ratio is typically much greater than the magnitude of the effect of a one percent reduction if price. (emphasis mine)

They conclude:

> The argument that advertising serves merely to allocate spending between brands within broad groupings of products is called into question by these results. If anything, advertising comes through as a more important determinant of the interindustry allocation of sales than are relative prices.

However, they also note evidence in their results of an additional causal relation running from sales to advertising beside that running from advertising to sales. This is consistent with a study conducted by Schmalensee (65) which focussed attention on the effectiveness of advertising in stimulating industry demand in the American cigarette industry. Schmalensee concluded rather negatively that:

> . . .the significance of these sums was not sufficient to allow us to conclude that industry advertising had any effect on industry demand.

This result was consistent with earlier studies by Meissner (52), Taylor (79) and Peles (62) though not with the findings of Nerlove and Waugh (58). Schmalensee suggests that the explanation is to be found in the simultaneous adjustment of advertising to sales which results in an upward bias in the ad-

vertising coefficient unless simultaneous equation techniques are employed.

On balance it is suggested that the Comanor and Wilson results, based in part on simultaneous estimation techniques, and the Nerlove and Waugh findings, which implied a dynamic effect of advertising, are to be preferred. The results suggest that high levels of advertising are incurred by an industry not as a means of increasing the market share of any particular firm but as a means of increasing industry demand relative to other consumer industries. However wasteful advertising is within an industry, the combined level of expenditure may be successful in increasing demand from outside it.

The examination of the aggregative effects of advertising leads naturally to broader questions of economic organization and development. While a detailed study of imaginative economic writing in this area is beyond the scope of this paper, three arguments might be mentioned briefly.

Kaldor (42) has attributed the rise of advertising to the substitution within the modern economy of a system of manufacturer's domination for the earlier (nineteenth-century) form of wholesaler's domination. Writing in the 1940's he envisages the emergence of a countervailing force of retailer's domination. Galbraith (32) (33) (35) extends the argument into a world of large investment in technology and capital, long intervals between initial planning and final consumption, and consequent intensive planning. The typical firm response to these factors and to the risk and uncertainty of market conditions is the assertion of control over the market, private and public. In this world advertising serves three functions:

1. to eliminate the possibility of inadequate or unpredictable price behaviour for a proposed good;

2. to justify and sustain the acquisitive ambitions of consumers in order to maintain a high level of aggregate demand;and

3. to enhance the prestige of and ensure the continued operation of the industrial system.

On the other hand Johnson (41) argues that the nature

of intensive selling techniques has been conditioned by the largely fortuitous development of the mass media:

> A more fundamental explanation, in my judgment, lies in the development of cheap media of mass communication, which have made it possible to address messages to large numbers of persons simultaneously at a lower cost per person addressed than the cost of person-to-person selling and so have fostered both the substitution of advertising for personal selling and increased emphasis on selling as a branch of business activity.

He suggests that the mass media are determinative of the messages to be carried. Even more significantly, the economics of media advertising also restrict the number of potentially advertisable goods to the finite class of products which are purchased frequently or which yield a high profit though in either case consumers must be sensitive to advertising appeals and not highly sensitive to price.

III MARKET FOR ADVERTISING MESSAGES

Economists have distinguished two conceptually separate problems respecting the allocation of resources:

1. the allocation of resources to the production and distribution of advertising messages, and

2. the allocation of resources to the production and distribution of highly advertised as opposed to unadvertised products.

Both markets are traditionally examined in terms of the orthodox supply and demand analysis though recently some studies have suggested that a more dynamic analysis might be more appropriate. This section will examine the function and impact of advertising in the market for advertising messages. It also addresses the question of whether the current volume of advertising is excessive and provides a preliminary framework for the treatment of the anti-competitive influences of advertising presented in section V. The discussion will conclude with a caveat regarding the acceptance of the traditional theory of the demand for information.

The conceptually interesting problem regarding the market for messages concerns the demand for messages, i.e., the demand for advertising. Our typical consumer is faced with a variety of sources of information including personal inspection, direct experience with the product, word-of-mouth information, journals and other informed sources, and advertising. The role of advertising is best understood in the larger context of consumer search theory. The demand for advertising represents one aspect of the demand for information.

The classic starting point for the analysis is Stigler (75). Stigler assumes a typical market in which homogeneous products are traded. The gains from new information are reflected in lower asking prices by sellers and increased search is assumed to yield diminishing returns with the result that the information-demand curve is downward sloping. Consumers will continue to search for information provided the expected saving in cost exceeds the marginal cost of searching. At the optimum, the marginal cost of an extra unit of search just equals the expected saving (being

the quantity to be purchased times the expected reduction in price). The costs of search are reflected in either the price charged for information services or the opportunity costs to buyers of direct search in terms of income or leisure foregone. Over time, the optimal quantity of search for goods purchased with any degree of frequency will depend upon the correlation of individual asking prices in successive time periods. Where the correlation of asking prices is unity, no further search need be undertaken in successive periods; at the other extreme, where the correlation is zero, a new search must be conducted in each period in which purchases are contemplated. In intermediate periods the initial search will assist the consumer in subsequent periods by reducing search in the later periods.

The analysis has been extended by Mincer (54) to take wage rates into account. He points out that only if the ratio of consumption of a particular good between two persons earning different salaries is equal to the ratio of their respective wage rates will the expected reduction in price per unit from an additional unit of search be identical for the two consumers. If, for example, the richer individual consumes more than twice the amount of the good than his counterpart, his optimal amount of search will be greater than that of the lower wage earner by virtue of a higher marginal revenue. Conversely, if our richer individual consumes less. Accordingly, he reasons that for goods exhibiting an income elasticity greater than unity, the richer consumer will acquire more information and pay typically lower prices; conversely he will acquire less information and pay higher prices than his lower wage counterpart for goods with an income elasticity less than unity. Holton (37) has pointed out that the typical consumer initiates the search process with a varying degree of information based on previous experience, the nature of the product if it is readily observable, the rate of technological change and the stability of asking prices over time. Both Holton and Mincer stress that consumer characteristics will affect the optimal amount of search in particular markets. But Holton's argument also demonstrates that information about the quality of goods, rather than merely the price of goods is not adequately dealt with by Stigler's analysis if the assumption of fully homogeneous products is dropped.

There are at least two ways to reconcile the Stigler theory with the problem of quality information. Farley (26)

has suggested that where brands in the same commodity class can be regarded as good substitutes, buyers may be said to search for the lowest price among alternative brands rather than merely for the lowest price for a given brand. This assumption however merely extends the range of the theory of search for price information into the world of branded goods. Insofar as branded goods exhibit or are perceived to exhibit quality differences, his analysis has little to add.

An alternative proposed by Comanor and Wilson (16) is to measure the gains from additional search by the increase in perceived performance that is due to searching further for a better product as well as for lower prices. Accordingly the higher the perceived variance in product performance among brands in a commodity class the greater the gains from increased search. It should be noted, however, that the information costs within this framework should be correspondingly greater than in the case of fully homogeneous products. And indeed, as Holton (37) has suggested, where the frequency of introduction of new products is high information costs will rise substantially.

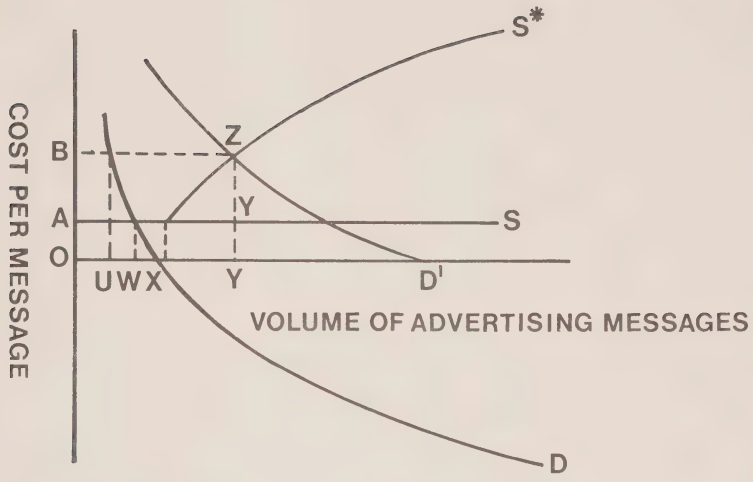
Accepting the demand-for-advertising curve as derived from the demand for information then, one can address the problem of the justification of the existing volume of advertising. There are two questions involved as Doyle (20) pointed out:

1. are consumer information requirements sufficiently large to justify the expenditure of between 2% and 4% of consumer expenditure in Canada, the United States, and the United Kingdom?

2. could the same function be performed more efficiently?

The following discussion focusses on possible answers to the first question but a brief consideration of the second inevitably follows.

In order to proceed we must complete the supply and demand apparatus by adding the supply curve. The following analysis is based on an article by Steiner (73) as elaborated by Comaner and Wilson (16).



Assuming the demand curve (indicated by curve D on the graph) to be downward sloping, it is clear that the demand curve for advertising reaches the horizontal axis at some point indicating that at that volume, consumers are only prepared to demand the messages if they are distributed at no cost, that is if the messages are free. Beyond that point more messages are absorbed only at a negative cost - if consumers are paid to receive such messages. Payment is conceived of in terms of the subsidy rendered to newspapers, magazines, radio and, particularly, television. Put another way, the entertainment provided by these media represent the payment to consumers for acceptance of the concomitant advertising.

The costs of the supply of advertising might be conveniently regarded then as embracing a fixed cost and a variable cost. The fixed cost (shown by line S above) represents the supply prices for production and distribution of advertising messages; constant costs are assumed for convenience. Beyond the point X, the supply curve S* includes a variable

cost representing the cost of the subsidy to the various media services and hence to the consumers. The price and quantity of advertising messages actually obtained in the market depends upon a second demand curve representing the demand by suppliers for advertising messages (indicated by D' in our graph) which are purchased from the media and which are conveyed to consumers. The clearing price and quantity in our graph is given by the intersection of S* and D'. Accordingly the volume of advertising messages provided is given by OY, the cost per message of OB being composed of a fixed cost OA and a variable or subsidy cost AB. Advertisers pay a total of OBZY of which ABZY represents a "subsidy" to the media.

The graph suggests that, as Comanor and Wilson (16) point out, joint products exist in the supply of advertised products. However the joint supply is not that of the advertised product and the advertising message as Kaldor (42) and Telser (84) have suggested. Rather the joint supply involved is that of the advertising message and the media content or entertainment. The price and quantity demanded of the advertised product are determined by factors operating in the market for the advertised products. In particular, since the advertised product is not regarded as supplied in common with its own advertising, the price of the advertised product is not automatically given by the cost of the good plus the cost of the advertised product as is commonly assumed.

The analysis further suggests that while advertising enters the supply function of the supplier of the advertised good in the product market, it is the market characteristics which ought to be more closely examined to ascertain whether advertised goods are sold at a higher price than unadvertised goods. Specifically the analysis suggests that attention must be focussed on the factors which influence the shape of the product demand curve. A later section of this paper discusses the role that advertising may play in influencing the shape of the demand curve by creating barriers to entry or by stimulating product differentiation.

The preceding analysis provides a means of assessing the debate on the existing volume of advertising. The most lucid criticism is offered by Kaldor (42) as summarized by Telser (84):

> The amount of advertising supplied is excessive relative to the demand because in most cases advertising is provided at a zero price to potential buyers while the cost of advertising is positive to society. Since advertising employs scarce economic resources, one would think that the suppliers of advertising would prefer to sell it at a positive price if they could. However, advertisers may believe that the amount of advertising that would be demanded at a positive price is less than the amount they should provide to maximize their profits. The advertising expense is borne by the consumer, who pays higher prices for the advertised goods. In addition, since most advertising is not supplied at a positive price separately from the goods and services being advertised, it is concluded that buyers have more advertising foisted off on them than they would be willing to purchase in a separate market for advertising services. This implies a departure from marginal cost pricing and a consequent waste of resources.

The argument relies upon two questionable assemptions. First, it fails to recognize that the effective price of advertising is negative. Secondly, it assumes that advertising is supplied jointly with the advertised product, not with entertainment in or on the media. However, it is clear that if advertising were supplied separately, consumers would demand the informational content in advertising in the amount of OW (determined by the intersection of D' and S) on the graph above. Accordingly consumers receive WY more advertising than they would have desired had advertising been sold separately. The critisism suggests that advertising serves a role for suppliers beyond the informational role demanded of it by consumers.

Steiner (73) has suggested that, again employing the graph, the amount of excess advertising is to be understood as YU. Given the prevailing price of advertising under a market system in which advertising is deployed as an intensive selling technique, sellers are forced to absorb YU advertising or advertising costs of OB.YU unless they are somehow able to pass such costs on to the consumer.

Comanor and Wilson (16) have added the further refinement that the excessive advertising debate really depends upon an analysis of the market structure in the market for

the advertised good. The relationship between D and D' will vary. The more competitive the market, the closer together will be D and D' and the smaller the amount of excess advertising:

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> . . . under conditions of pure competition with imperfect information, producers may provide a suboptimal volume of advertising. Because the product is relatively homogeneous, each producer will ignore the positive external effects of his own advertising on the sales of his competitors in the market . . . . In large numbers markets with product differentiation (monopolistic competition), the opposite result holds . . . the firm's demand price for advertising will probably exceed the consumer's demand price . . . In markets where entry is retarded, on the other hand, the volume of advertising contributes to the volume of monopoly profits earned by member firms . . . . Where advertising has a strong input on entry barriers, or where it serves to reduce the elasticity of demand for the major firm's products, the two demand curves for advertising may be far apart.

The implication appears to be that while there is clear evidence of a large subsidy to the media from producers of certain consumer goods, it may be that overall advertising by all suppliers is close to optimal or even suboptimal. The theoretical analysis does not permit any clear answer on the subject.

Telser (84) has added the further insight that even in those industries in which advertising clearly appears excessive, as evidenced by large subsidies to the media, the presence of a negative price for advertising need not imply a loss of efficiency. This is explained by the presence of economies of joint supply. Just as an automobile is more efficiently produced and marketed as a single unit, it may be that advertising is more efficiently marketed in joint supply with the product. His criticism appears to contradict the premise above that advertising is properly regarded as marked jointly with entertainment. However, insofar as it suggests that if subsidies to the media were prohibited, the transaction costs of selling advertising separately would be higher than the figure represented by OB.YU, it raises an interesting point. This implies, of course the abolition of advertising and the substitution of an alternative source of information before the comparison can be made.

The only commentator to consider the possibility of an alternative to advertising is Kaldor (42). He suggests that the equivalent or even a superior information service could be provided by a central agency for approximately one fifth of the present expenditures on advertising. Insofar as advertising serves an informational role, one is inclined to accept Kaldor's proposition. However, later sections of this paper suggest that advertising is best understood as performing a non-informational function. In addition, it should also be mentioned that Kaldor's proposal pays no attention to the cost of alternative subsidies to the media.

In summary then, the debate is rather inconclusive. It does suggest, however, that the economists of advertising may generate a suboptimal amount of information in some markets and an excessive amount in others. And it suggests that excessive advertising may be presumed to occur in those industries whose products are highly advertised on the national media. However it is open to question whether, if advertising were abolished, any more efficient system could be devised for the transmission of consumer information by pricing information separately. In addition the analysis underlies the importance of advertising for the continued existence of the mass media and suggests that adequate substitutes for the foregone subsidies would be required should a policy of abolition be pursued.

It is proposed to conclude this section with some rather deeper doubts. The analysis presented in this chapter, notwithstanding the inability to deduce unqualified conclusions, has a logical attraction for the economist. It permits some attractive deductions and provides a clear method of analysis. However it should be mentioned that consumer theory and the theory of demand is regularly challenged on several grounds. As Doyle (20) suggests, supply and demand conditions are dynamic. The assumptions that wants are static and uniformly perceived, and information requirements are simple, are clearly misleading. This appears to be the argument presented in the works of Katona (44) (45) and the model of Ozga (59) in which constant learning is a central feature of buying behaviour. So too, Gabor and Granger (31) suggest that the market is not really cleared by price. Rather price serves as a proxy for quality in the mind of consumers who enter the market. It is unrealistic, however, to suggest that any coherent alternative theory has been formulated. In the absence of a viable alternative, utility theory and the theory of demand are generally relied upon as sufficient approximations of reality for both theoretical and empirical purposes.

IV THEORIES OF ADVERTISING AND BRAND LOYALTY

Before proceeding to an analysis of the anti-competitive influence of advertising, it is useful to clarify the transmission mechanism by which advertising enhances sales. It is insufficient to proceed on the assumption that advertising stimulates product differentiation and thereby exhibits an anti-competitive influence without a reasoned causal explanation for the efficacy of advertising. The available empirical economic literature analyses the role of advertising in a finite number of consumer non-durable and a very limited number of consumer durable industries in which branded goods are particularly important. This section, then, first investigates the alleged role of advertising in establishing brand loyalty. It then considers some further empirical evidence on the ability of advertising to affect market shares and concludes by summarizing some recent theoretical articles on the non-informational role of advertising.

Forfman and Steiner (19) have demonstrated theoretically that, for a profit-maximizing firm, advertising spending should be allocated such that the marginal revenue from advertising just equals the ordinary price elasticity of demand facing the firm. Accordingly, where product differentiation is high, assuming diminishing marginal returns to advertising, will be high. For the typical consumer-goods industry, this implies that a persistently high level of advertising can be viewed as a symptom of product differentiation. However, it is not, without more, sufficient to establish that advertising is itself a cause of product differentiation.

To this end, it is necessary to examine the literature on brand loyalty. Most of this literature is unfortunately confined to an investigation of socio-economic variables associated with brand loyalty. One is left to deduce the influence of advertising from the performance of hypotheses based on the Stigler theory of search. The first test of the Stigler theory was made by Farley (26) (27). He reasoned that the expected gain associated with searching among brands in a class should be positively correlated with the amount purchased by the buyer. Therefore he reasoned that:

1. if brand preferences are weak, heavy buyers will be less brand loyal than light buyers;

2. high-income households will exhibit more brand loyalty as opportunity costs are higher; and

3. for a given level of income, large families will be more brand loyal than smaller families.

His results were unsatisfactory, however, as all of his hypotheses were at least partially contradicted. On the other hand Farley (27) partly confirmed the Stigler hypotheses by finding that consumers are less brand loyal when many brands are available, the number of purchases or dollar values of expenditures are high, or prices are relatively active. He suggests that the evidence tends to support the hypotheses that brand loyalty is a function of barriers to entry created by suppliers rather consumer preferences.

Other studies of brand loyalty include Frank, Douglas and Polli (29), and Frank (30). Their chief importance lies in the doubt they cast upon the stability of brand loyalty over time, and upon the advertising-as-information theory. Rather they suggest that the role of advertising and brand loyalty are to be understood as an alternative to search or as a guide to the brands to be searched (as is discussed later in this section) rather than as a source and guarantee respectively of information.

A second method of testing the effectiveness of advertising is an evaluation of the stability of market shares of advertised as opposed to non-advertised products. Telser (83) has actually found lower brand share stability for a group of highly advertised toiletries and cosmetics than for a little advertised group of food items. Gort (36) got only mixed results when he compared 163 differentiated industries vs. undifferentiated industries. Finally Mann and Walgreen (49) analysed 12 industries and found no significant association between stability and product differentiation. One is inclined to accept the negative conclusions of Schmalensee (65):

> there is little evidence to suggest that advertising creates durable patterns of consumer loyalty. On the other hand, little refutes such an hypothesis either. Demand studies have come up with no hard facts, a compatison of stability have generally failed to consider other determinants of brand-switching and neglected to take into account the stability of

advertising outlays themselves.

What then, is the best view of the behavioural function of advertising? Recently several articles have suggested that the role of advertising is to be understood in terms of, and indeed, varies according to, the nature of the consumer good. A natural starting point is the classic study of Borden (10) who concluded that advertising will be most effective under the following conditions:

1. there is a substantial chance of differentiating the product in the eyes of the consumer;

2. hidden qualities exist that cannot be judged at the time of purchase;

3. strong emotional buying motives exist such as the protection of health or the enhancement of one's social position;

4. the combination of sales volume and gross margin is high enough to permit the necessary amount of advertising expenditures.

As Doyle (21) points out, each of these factors makes the demand curve more inelastic and therefore encourages advertisement. But Borden offers no causal relationship, his perspective being more in the nature of an overview.

Doyle (21) observes the preponderance of advertising in consumer non-durables and offers an explanation in terms of an "optimally imperfect decision".

> The traditional model of consumer behavior assumes that the consumer will, subject to his budgetary constraint, achieve the highest level of satisfaction by distributing his purchases to where the marginal rate of substitution of good x for good y equals the ratio of their prices. However, . . . , the implied premise that the optimization procedure is effortless leads to seriously misleading predictions. Information frequently entails a direct monetary cost to obtain and always costs time . . . thus where time and the disutility of the optimization effort are taken as valuable resources, and included

> as data in the consumer's budgetary constraint, it may not be economical for consumers to expend time in seeking small saving opportunities.
>
> This suggests that for low-priced consumer goods, particularly where there is a substantial range of differentiated products to choose from, the value of earnings foregone in searching for cheaper substitutes as implied by conventional analysis will often exceed any conceivable monetary gains. In these cases the level of advertising may represent not a monument to consumer exploitation but rather reflect the consumer coming to terms with the costs of budget optimization. Reliance on advertising, rather than searching for more objective information, would then be the consumer's equivalent to the 'optimally imperfect decision' of the firm.

As proof, Doyle does find an inverse association between unit prices of goods and their advertising:sales ratio. He also finds evidence that the advertising:sales ratio varies directly with the informational difficulties involved in ascertaining the attributes of the product, and indirectly with the frequency of purchase.

Doyle's analysis is consistent with the empirical studies which find little evidence that advertising creates any "goodwill" stocks or brand loyalty. Advertising is regarded as a function of the product characteristics rather than of antecedent market structures. The analysis implies that if all firms in an industry were to reduce their expenditures, market shares of the firms would be unaffected though industry demand as a whole might decline as discussed above.

Nelson (55) has also argued that the role of advertising must be understood in relation to the class of goods advertised. He distinguished "search goods", whose qualities can be ascertained prior to purchase by inspection, from "experience goods", whose qualities cannot be determined prior to purchase. The Stigler theory of search applies only to search goods. For experience goods, the consumer will purchase information by sampling brands in the commodity class until the point is reached at which the marginal cost of an extra unit of information (being the loss in utility from consuming a brand at random rather than consuming the best brand one has

sampled) just equals the marginal revenue. He argued that the decision to search ought to lead to a greater sample size than the decision to experience a good. And, most frequently, he suggested that as a result of advertising different consumers tend to experiment with the same brands with the result that a small number of experiments are made on a limited number of branded experience goods. He found some evidence for the proposition that a smaller sample will be conducted for experience goods. In a later article Nelson (56) elaborated upon the effect of advertising in increasing the likelihood that a particular experience good will be sampled by consumers. After summarizing the results of a test which suggested, as predicted, that experience goods are more highly advertised than search goods, Nelson stated his fundamental behavioural preposition:

> . . . advertising of experience qualities increases sales through increasing the reputability of the seller, while advertising of search qualities increases sales by providing the customer, with 'hard' information about the seller's product.

The theory advanced by Nelson has the advantage of illuminating a possible causal relationship between advertising and sales. It is broadly consistent with a model proposed by Telser (81) in which the latter suggests:

> Advertising is more likely to increase the probability of transitions to a brand at given prices than to affect repeat purchases. Repeat purchases in this view result from consumer satisfaction with the brand. Advertising, however, is seem as a means for attracting purchases both from other brands and from the outside.

Following Nelson's view it may be that advertising of experience goods is increasingly effective as the scale of advertising expenditures is increased; that is, there may be technical economies of scale in advertising as discussed below. However empirical evidence of the strength or duration of this effect is still unavailable.

Both the Doyle and Nelson models imply a departure from the informational model of advertising. They suggest that the function of advertising is to fill the void created

by ignorance not to supply information. Moreover it is implied that the demand for advertising, if it exists at all, is to be considered a demand for a substitute for information.

V ADVERTISING AND OLIGOPOLY

In the competitive market model there is no place for any form of promotional expenditure, including advertising, as all goods are homogeneous and consumers are indifferent between rival sellers. Competition takes place only through the price mechanism. As all sellers are price takers at any level of output, no producer would contemplate advertising for two reasons. First, the added costs would give an advantage to his lower-priced competitors. Secondly, advertising would exhibit large external effects; that is, the advertiser would be unable to appropriate the positive effects of advertising for himself but would have to tolerate the accrual of an advantage to all firms in the industry.

For this reason the presence of advertising is commonly associated with a departure from the competitive market, typically with an oligopolistic market structure. Some economists, e.g. Galbraith (33), view advertising as one of many tools available to large firms to reduce the risks facing the firm. That is, advertising is regarded as a reflection of a pre-existing oligopoly created by more fundamental economic factors. Others, of which Kaldor (42) is a good example, go on to suggest that advertising is closer to the cause than the result of monopolistic competition:

> The reason for this is that the shift of the demand curve resulting from advertising cannot be assumed to be strictly proportionate to the amount spent on advertising - the 'pulling power' of the larger expenditure must over-shadow that of smaller ones with the consequences (a) that the larger firms are bound to gain at the expense of the smaller ones; (b) if, at the start, firms are more or less of equal size, those that forge ahead are bound to increase their lead, as the additional sales enable them to increase their outlay still further. Hence after advertising has been generally adopted, and the trade settles down again to some sort of equilibrium, the pattern of industry will have changed; sales will have concentrated among a smaller number of firms, and the size of the 'representative firm' will have increased.

The view one takes of the function of advertising also influences one's perspective on the reversibility of the oligopolistic trends by means of the abolition of advertising. Those who subscribe to the view that oligopoly is the result of non-advertising factors and that advertising merely indicates the presence of an oligopolistic market, naturally take the position that the appropriate anti-competitive policy is directed towards those physical factors creating monopolistic competition: see for example Johnston (41). Kaldor (42), on the other hand, asserts:

> It follows moreover, that if the previous state of equilibrium was a 'stable' one, and not merely a 'neutral' one - this 'concentration' effect of advertising will be a reversibile one; the continuance of the new equilibrium will depend on the continuance of advertising, and would be followed by a process of deconcentration if advertising were to cease.

This section discusses the theoretical and empirical literature on the influence of advertising on oligopoly or monopolistic competition. It examines first the Kaldor argument, then the barriers to entry theory, and finally the importance of product differentiation and product characteristics.

Kaldor's article (42) contains a great many ideas concerning the role of advertising and it is to some extent improper to single out the "creation-hypothesis" alone for consideration. However, further consideration of the passages cited above suggests several additional insights. First, Kaldor's approach is essentially historic, while the following studies are more concerned with explaining the role of advertising within the present economic structure. To the extent that the development of advertising reflected a larger trend in economic organization in which advertising was a necessary feature, further changes in economic organization may well result in a system in which advertising is no longer a necessary component. To this extent at least, the "concentration-effect" Kaldor speaks of may be reversible over the long run. Secondly, Kaldor points to two channels of influences of advertising:

(a) larger firms are bound to gain at the expense of the smaller ones;

(b) if, at the start, firms are more or less of

> equal size, those that forge ahead are bound to increase their lead . . .

His method of approach is to posit an increase in intra-industry demand due to a positive effect of advertising. Turning to (a) he gives no reason for the initial existence of larger firms. The approach assumes at least a nascent oligopoly from the start. As for (b) there is no logical reason for any particular firm to forge ahead in the absence of product characteristics which permit product differentiation, that is that permit the establishment of monopolistic competition.

Some general tests of Kaldor's theory on the relation between concentration and advertising have been made. It is clear that the incidence of advertising is unevenly distributed between industries. Specifically a high advertising:sales ratio is confined to a narrow range of branded goods. Two studies by Kaldor and Silverman (43) and Else (24) have suggested that differences in competitive conditions (as represented by a concentration ratio), together with the costs of information and the nature of demand, are key factors in explaining the incidence of advertising.

However, as Doyle (20) points out this oversimplifies the matter. Jastram (39) has demonstrated that irrespective of the degree of concentration among sellers, consumer non-durables exhibit a higher advertising:sales ratio than either consumer durables or industrial products. Moreover Kaldor and Silverman's data (43) reveal that some of the most heavily advertised goods appear in the highly competitive pharmaceutical sector. Finally Telser (83) found no empirical support for an association between advertising and industrial concentration. His findings were supported by similar findings by Eklund and Maurice (22) and Eklund and Gramm (23) in the United States. Doyle (21) reported a similar absence of correlation between advertising and concentration in the United Kingdom as did Reekie (64) and Schnabel (66). While these findings are unanimous in the view that no correlation exists, it should be noted that the empirical studies reported by Mann et al (46) (47) and Mann and Meehan (48) found a significant correlation. On balance one is inclined to accept the majority position however.

Accordingly, the sphere of influence of advertising

on oligopoly appears restricted to the markets for mass-produced consumer goods, generally consumer non-durables. Moreover it is suggested that there is neither theoretical nor empirical evidence for the argument that advertising created oligopolistic markets. More recently, therefore, attention has been focussed on the role advertising plays in sustaining oligopoly by erecting barriers to entry of new firms to deter new competition and permit higher than average profits.

Before considering the hypothesis in greater detail, it is advantageous to consider a continuing debate on profitability. It has been asserted by Comanor and Wilson (14) (16), Backman (1) and Miller (53) that a clear association exists between profitability and advertising intensity. The argument advanced, as Schmalensee notes (65) runs as follows:

> Traditionally, a correlation between advertising intensity and seller concentration is taken to mean that high levels of advertising tend to increase seller concentration. Similarly a correlation between advertising and profitability is usually interpreted as showing that high levels of industry advertising insulate firms from one another and raise entry barriers, thereby increasing industry profitability.

If higher-than-average profits were obtained by firms exhibiting high advertising, this would be some evidence for the existence of barriers to entry.

Comanor and Wilson (16) estimated profit equations for 41 industries testing explanatory variables representing advertising, concentration, economies of scale, capital required for entry, the rate of growth of demand, and the price elasticity of demand. They found that each of the advertising, capital requirements and growth of demand variables were significant while the concentration and economies of scale variables were always insignificant. On this basis they concluded:

> Our primary finding is that heavy advertising leads to increased profits. . . . Advertising in this analysis acts as a proxy for product differentiation, or, more specifically, for the product and market

> characteristics that permit heavy advertising expenditures to differentiate effectively the products of a firm from those of its rivals.

This theory, that advertising permits product differentiation which by its very nature presents an entry barrier to potential entrants is discussed in greater detail below.

The empirical results have been challenged, however, by Telser (86) who has suggested that firms in industries exhibiting heavy advertising:sales ratio do not necessarily earn higher than average profits. It is argued that by expensing all advertising expenditures rather than capitalizing and depreciating such expenditures as investments, both measured profits and shareholder equity will be understated. As Telser states:

> The measured profit rate is the ordinary accounting measure of profit after taxes divided by shareholder equity. The latter is total assets less debt. The problem is that shareholder equity understates the true capital of the firm and that the measured profit understates the true profit. Both are the effects of the same cause; namely, the tendence to omit intangible capital. Stockholder equity includes only tangible capital and the profit is too low because in effect it allows a 100 per cent rate of depreciation of intangible capital.

In particular, the higher the advertising:sales ratio the more the reported profit rates will be overstated.

This point was further investigated by Weiss (89) who obtained estimates of the true rates of return for 38 industries and noted that the true profits exceeded reported profits in 34 of the 38 industries. He also noted that the distribution of unreported profits were distinctly uneven with the soap, drug and soft-drink industries together accounting for 42 per cent of the unreported profits. However, when Weiss substituted his "true" rates of return for the reported rates of return employed by Comanor and Wilson for the purposes of re-estimating the relationship between advertising and profitability, he obtained results similar to those of Comanor and Wilson. In a later study included in their book, Comanor and Wilson re-examined the theoretical question and

estimated true rates of return. Their findings were consistent with the two hypotheses that:

1. The internal rate of return is positively related to the relative level of advertising;

2. Investment in advertising typically yields rates of return above the cost of capital.

A second challenge was presented by Schmalensee (65) who cast doubt on the explanatory power of the advertising: sales ratio vis-a-vis the profit variable. If advertising were exogenously determined, he asserts, a positive correlation between advertising and profit might imply that advertising results in increased profits. However, because there is both theoretical and empirical evidence that advertising is at least in part if not wholly determined endogenously any correlation is of no consequence. For technical reasons, if advertising responds to sales, and if the ordinary least squares method is employed for estimating the coefficients of profitability and advertising, there will be a positive correlation between advertising and profitability in the equation estimating the profit variable even if advertising is no way assisted in the creation of market power.

To summarize, it is suggested that Comanor and Wilson have won the debate regarding profit rates by demonstrating that the true rates of return may also be positively correlated with relative advertising. However, there are reasons for suspecting that the explanatory power of the advertising variable with respect to industry profits is unreliable. There has been no convincing demonstration that high advertising necessarily implies high rates of return.

The argument that advertising creates barriers to entry was first introduced by Bain (2) and has been subsequently tested and refined by Comanor and Wilson (16). The theory of monopolistic competition first stated by Chamberlain (12) suggests that, in industries characterized by a concentration of sellers, competition is more likely to take place in non-price forms. A price cut is likely to lead to retaliation by competitors and a general reduction in profits. However, product changes and improvements and marketing techniques are viewed by sellers as presenting opportunities for long-term gains which can be exploited with the aid of advertising .

Under such conditions, and assuming unilateral advertising is effective is enhancing market shares (about which doubts have been expressed above) few firms would risk reducing advertising for fear of losing out to their competitors. This suggests to Johnson (41) among others that much advertising merely serves to cancel out other intra-industry advertising and is therefore wasteful. As Doyle (20) notes:

> In such a situation advertising is often not doing much beyond maintaining a status quo, leaving the sales of individual firms similar to what they would have been if advertising had been reduced all round.

Where such situations occur the consumer is clearly worse off for he is required to absorb the cost of excessive industry expenditures on advertising.

In addition the high level of advertising expenditures may maintain the existing oligopolistic market structure by creating barriers to entry.

Bain (2) has defined an entry barrier as:

> . . . the advantages of established sellers in an industry over potential entrant sellers, these advantages being reflected in the extent to which established sellers can persistently raise their prices above a competitive level without attracting new firms to enter the industry

Perhaps a clearer definition is offered by Stigler (78):

> . . . the cost of producing (at some or every rate of output) which must be borne by a firm which seeks to enter an industry, but is not borne by firms already in the industry.

It should be stressed that barriers to entry depend upon the presence of differential advantages enjoyed by existing firms, not merely upon the high absolute cost of entry which may have been borne by established firms in the past. Moreover, such entry barriers are effective in excluding new entrants only to the extent that existing firms limit their short-run profits, either by increasing advertising outlays or by reducing prices, to the levels permitted by their differential advantages. If such conditions obtain a new entrant is forced

either to incur higher per unit selling costs or to offer lower selling prices in order to enter the market.

The entry barriers can be explained in terms of one or both of the following types of economies of scale:

1. Advertising may exhibit pecuniary economies of scale, based on a lower per unit cost of messages as the number of messages purchased is increased.

2. Advertising may exhibit technical economies of scale, based on an increasing effectiveness of advertising in stimulating brand loyalty or differentiating the product as the number of messages deployed increased.

The evidence of pecuniary and technical economies is examined in order. Pecuniary economies of scale arise when the price of advertising messages falls as the number purchased rises. There is very little evidence on whether such economies are to be found in the magazine industry. However as regards television rate structures (in the United States) the evidence of Blank (9) and Peterman (63) suggest that there are no real economies of scale present. Comanor and Wilson (16) did a limited test and found some evidence of quantity discounts for one of the three networks. They also found evidence of discounts on individual programs but concluded that firms did not make use of them. Bain (2) casually mentions the possibility of such economies but is inclined to view the incidence of pecuniary economies in sales promotion as arising out of nationwide distributing systems, etc. which are beyond the scope of this paper.

Accordingly, attention has been focussed on the technical economies of scale. If the effectiveness of advertising products increases with the number of messages there are clearly economies of scale. The lower the cross-elasticities of demand between products, the less responsive are consumers of that product to changes in the prices of substitutes. If advertising can be assumed to be effective in lowering the cross-elasticities of demand for products as discussed in section IV it is clear that advertising serves to stimulate an oligopolistic situation as between existing firms in the market. And, if it can further be demonstrated that there are technical economies of scale, it must be assumed that advertising also creates barriers to entry.

It has been suggested earlier that advertising operates to increase the likelihood that the advertised brand will be sampled by a consumer. Alternatively, Comanor and Wilson (16) have suggested that the function of advertising is to encourage brand switching and sustain repeat buying. They argued that is easier to stimulate the former than the latter. Economies of scale may be posited in one of two ways. It has been argued that the function of advertising effectiveness exhibits increasing returns over a substantial range after which diminishing returns set it. Dean (18) suggests that is partly due to economies of specialization and partly to economies of repetition. Borden (10) and Chamberlain (12) adopt a similar view though Si...on (69) has recently doubted the proposition.

Alternatively, some economists have suggested that the function of advertising effectiveness exhibits a threshold effect. The possibility of a discontinuous step function received some empirical support from Benjamin and Maitland (7) who concluded that:

> . . . there is a threshold value of advertising of a not inconsiderable quantity below which there is no applicable response and that there is eventually a state of near saturation in the sence of inordinate increase in advertising is required to achieve any increase in response.

Some casual evidence for the existence of a threshold is given by Comanor and Wilson (16) who note the existence of a:

> . . . large number of consumer-goods markets in which brands are divided into two classes, frequently called 'major brands' and 'independent brands'. These are distinguished generally on the basis of consumer familiarity and acceptance. In these cases, we typically find high cross-elasticities of demand among brands in either group but lower cross-elasticities of demand between brands in different groups.

Assuming then that a new entrant will produce at a lower output level than the established firms, he must still commit himself to advertising expenditures beyond the threshold limit

or to the point of maximum effectiveness to ensure a competitive position. This implies that the new entrant will exhibit a higher advertising:sales ratio and higher per unit advertising costs than his established competitor.

Assuming the existence of such technical economies of scale, the volume of output at which such economies are maximized becomes relevant. If the output level at which such technical economies are exhausted fails short of the most efficient plant size as determined by production and distribution economies, then such technical economies do not present barriers to entry, provided they have the capital to establish the most efficient scale of production will exhaust technical economies of scale in advertising. However, as Bain (2) notes it is quite possible that:

> . . . the optimum scale for sales promotion may exceed . . . the best scale of entry as determined by production - distribution economies alone.

Some empirical evidence for the existence of technical economies of scale in advertising has been published in the last few years. Bain (2) conducted a rather casual set of experiments. He posited an association between the height of product differentiation barriers to entry and the size of the advertising:sales ratio for 20 industries and found some evidence that such a relationship existed. He tentatively concluded that the few industries with very high barriers to entry also have high product-differentiation barriers to entry and tend towards monopolistic output restrictions and excess profits. Those industries with moderate barriers to entry, however, exhibited lower product-differentiation barriers and appeared altogether more competitive. Moreover, those industries with low barriers to entry did not appear more workable in competitive terms than the second class of industries.

Telser (83) found evidence of concentration and advertising barriers to entry in the American cigarette industry. But the most complete study undertaken was that of Comanor and Wilson (15) (16). In a preliminary study they noted that, in most industries, the larger firms spend proportionately more on advertising than their smaller rivals for various definitions of large and small firms. However, for a limited number of industries, typically consumer non-durable industries, smaller firms spend proportionately as much or more than the

larger firms. They noted that these industries included most of the industries which exhibited high aggregate levels of industry advertising. This suggested the existence of scale economies in advertising. To test the hypothesis further, they examined profit rates across industries. They hypothesized first that, where scale economies in advertising exist, there would be a relationship between the size of a firm and its profit rate for all firms larger than the minimum efficient scale (MES - i.e. the scale that exhausts economies of scale in production). Next they examined the hypothesis that the minimum efficient firm size (i.e. that scale that exhausts economies of scale in advertising) ought to be larger than MES for industries in which the advertising:sales ratio is high and again found support for the hypothesis. Finally they tested the proposition that differences in profit rates between two firms, one of which is above MES and the other below MES, would be explained by scale economies. This hypothesis was also confirmed. Together the studies present a convincing confirmation of the existence of scale economies in advertising and indirectly of barriers to entry.

However, the results have been challenged by two economists. Telser (86) has argued, as mentioned in an earlier context, that the profit rates employed are not true profit rates and to that extent the figures may overstate profit and profit-differences for industries in which high advertising: sales ratios occur. This has already been dismissed above.

Schmalensee (65) takes issue with the assertion that advertising may raise MEF above MES. He agrees with another Telser criticism that the data estimates of MES and MEF are precarious and points out that the explanatory power of the advertising variable in explaining profits of firms above MEF is negligible and unreliable. But his most cogent criticism is reserved for the third test and is based upon his objection that advertising responds to the current level of sales rather than influences sales:

> The most telling point is that there is no way to determine the importance of the advertising:sales ratio in these equations. It may well be that the critical variable is the ration of the mean sales of the large firms to the mean sales of the small firm. It is not apparent from these regressions that a correlation exists between advertising intensity and profit differences.

In summary, then, there is plenty of theoretical support and some empirical support for the proposition that technical economies of scale exist in advertising. One can thereby deduce that advertising creates barriers to entry in such industries. But the evidence is not unambiguous, and, as is so often the case in economic studies, the techniques of econometric practice suggest the empirical evidence may well be unreliable.

VI ADVERTISING, ECONOMIES OF SCALE AND TECHNICAL PROGRESS

If advertising serves in the short run, to create or maintain oligopolistic market structures and hence monopoly profits, it could be argued that advertising nevertheless ultimately contributes to lower prices by stimulating either economies of scale in production and distribution or technical progress. This section considers very briefly some of the arguments raised with respect to the influence of advertising on each phenomenon.

The argument that economies of scale are fostered by advertising can be considered both in terms of the effects on demand and the ultimate effects on costs. As for the former, the paper has already highlighted the evidence which tends to suggest that advertising affects inter-industry demand. To this general proposition two qualifications should be made. First, Borden, in a previously cited passage (10) concluded that advertising may have a greater impact on the demand for new products than on the demand for established products. Secondly, it is difficult to prove satisfactorily using econometric techniques that advertising does enhance sales at the firm level. It is even more difficult to disentangle the effects of advertising over the long run from other dynamic factors such as technical progress and price cuts.

Even if it is assumed that advertising stimulates either firm or industry sales (or both) there is little evidence that the increased demand fosters economies of scale. If the Comanor & Wilson evidence (16) is acceptable, a significant proportion of firms exhaust economies of scale well before they exhaust technical economies of scale in advertising. The argument suggests that economies of scale in production and distribution might well be exhausted before any sales-enhancing advertising program is initiated. Moreover, it is difficult to press the concept of economies of scale very far into a multi-dimensional world in which most firms and plants manufacture a range of products. Finally, to the extent that advertising is associated with product differentiation or product-differentiation entry barriers it could be argued that the significant long-run effect of advertising is elevated costs. At the very least advertising-sustained oligopoly has not been demonstrated to be an economically satisfactory competitive structure.

The stimulation given by advertising to technical progress within particular industries is a much debated point. There are three separate arguments worth considering. The first, and most easily disposed of, suggests that advertising provides incentives to seek a higher standard of living and thereby encourages a greater degree of effort and enterprise. No doubt there is a correlation between per capita income levels and advertising, as noted, for example, by Johnson (41). However, there is a rather realistic causality problem in demonstrating that advertising causes prosperity, not prosperity advertising. Secondly it has been suggested that advertising seeks to maintain and improve the quality of merchandise by association between advertising and branding. But, as Doyle (20) maintains, it is hardly necessary to devote such high levels of expenditure on advertising to establish an identifiable brand in the market.

Finally, Galbraith (32) (33) (35) has argued that advertising serves to reduce the risks to the typical corporate entity attached to research and innovation by ensuring a satisfactory market for new products. In part this turns on the debate regarding the market structure most likely to yield optimal research and innovation. While classical economists might have regarded competition among firms to be the most direct incentive to innovate, others, including Schumpeter, regard concentrated structures in industry as "the most powerful engine of progress". The author offers no profound insights toward the resolution of that discussion. But it is also evident that no clear evidence exists showing that highly advertised industries are also characterized by product improvement and technical progress. Nor is the somewhat better correlation between concentration and innovation a satisfactory demonstration of any causal effect running from concentration to innovation. It is tempting to suggest that the nature of the product, and the degree to which the production processes are amendable to technical progress, swamp the competitive and demand factors as explanations for the incidence or absence of research and development in particular industries.

SUMMARY AND CONCLUSIONS

The economic significance of advertising varies across markets. To the market for industrial goods personal selling appears a more successful technique of intensive selling than advertising. Conversely the market for consumer non-durables and some durables appears dominated by advertising. While advertising appears at the retail or wholesale level, it is typically associated with manufacturer advertising in consumer industries. This essay has therefore concentrated on the economic effects of manufacturer advertising in the markets for consumer products.

At the aggregate level it was noted that advertising appears to influence the inter-industry demand for goods. Indeed it may well be that the presence of advertising is more important than relative prices in allocating demand between industries. Whether advertising affects the consumption:income ratio, influencing consumers to save a lower proportion of their income, has not been conclusively determined.

Advertising is traditionally regarded as a source of information regarding products. Accordingly consumers can be said to demand and the media to supply advertising messages in response to this demand. The picture is only slightly complicated by the presence of a demand by manufacturers for advertising which exceeds that of consumers. This analysis suggests two important conclusions. First, any proposal to abolish or reduce national advertising must consider the impact of restrictions upon the existing media. Secondly, the graphical analysis suggests that the presence or absence of excessive advertising, across the economy as a whole, can only be assessed by a consideration of the magnitude of advertising and the particular form of market structures in specific industries.

It has been suggested, however, that advertising is not appropriately regarded as derived from the general consumer demand for information. The theory of information propounded by Seigler has not fared well in empirical research into the determinants of brand loyalty and market share patterns. Recent papers have moved away from the advertising-as-information position towards what may be called an advertising-as-substitute-for-information perspective.

The major focus of the paper was an examination of the argument that advertising creates or stimulates oligopoly and monopoly profits. While there is little evidence of a direct role in the creation of oligopoly, it has been demonstrated that advertising appears to sustain oligopolistic structures by presenting barriers to entry to potential entrants in the markets for consumer non-durables. The source of such barriers appears to be technical rather than pecuniary economies of scale.

In the light of the preceding summary, various proposals for reform may be assessed. The most obvious proposal is the complete elimination of advertising. In favour of such a policy is the evidence that, even in the absence of proof that advertising affects intra-industry demand, high levels of advertising by all firms in an industry will influence inter-industry demand. Accordingly, there is little or no incentive for all firms within a particular industry to agree to reduce their advertising expenditures pari passu. However the proposal ought to be rejected for several reasons. First, the policy is far too general. As advertising excesses appear only in a finite number of markets a more selective tool to regulate particular excesses would be more appropriate. Secondly, high levels of advertising may well be justified as an adjunct to the introduction of new products. Thirdly, the policy would require a radical restructuring of the media subsidy system. Fourthly, there may be opportunities in many industries for the substitution of other more objectionable methods of intensive selling. Fifthly, insofar as the policy is designed to eliminate oligopoly, abolition of advertising is a second-best method aimed at the symptom not the cause.

A second policy, worthy of more serious consideration, is the reduction of advertising expenditures within particular industries. This could be accomplished in one of several ways. Direct controls which could be imposed limiting the time and space which the media can devote to advertising are a possibility. A more selective tool would be the imposition of maximum advertising:sales ratios for particular industries. The objection to both methods, however, is that such controls tend, given economies of scale, to favour the larger and the established firm over the smaller competitor or potential entrant. Alternatively one could resort to fiscal discrimination in the form of a tax on the advertising media or a tax on advertising expenditures. Some costs of each policy

should, however, be mentioned. As regards the former, Doyle (20) points out that the earlier English experience suggests that a tax on the advertising revenue of the media is merely passed on to the manufacturer and ultimately to the consumer. Similarly Corden (17) has noted that a tax on advertising would have to be progressive to encourage competition from smaller firms. A final method would be the reduction of advertising deductions under the Income Tax Act.

Measures designed to reduce advertising must be evaluated in terms of the social benefits to be derived. Such policies can be directed towards the goals of stimulating or of increasing the amount of product information distributed to consumers. If the primary aim of a particular policy is to stimulate competition it is suggested that advertising regulation is necessarily subordinate to other regulatory tools designed to attack the root causes of oligopoly. However this survey of the economic effects of advertising suggests that the opportunity for product differentiation may be one of those root causes. Conanor and Wilson (16) draw this conclusion:

> . . . factors which promote product differentiation may be as important as those which influence the size distribution of firms in their effect on the achievement of market power. Current policies that emphasize the role played by market concentration need to be supplemented by those concerned directly with the nature and extent of product differentiation.

Some policies designed to deal with product differentiation are discussed below in connection with a policy designed to increase information. However Bain's pessimistic conclusions (2) must also be acknowledged. In the end he suggests that consumers are naturally susceptible to the blandishments of product differentiating sellers and that:

> . . . we come at least to a presumably fairly stable characteristic of human nature as the root of the trouble.

It is difficult, he suggests, to attack this sort of entry barrier under traditional anti-monopoly legislation; it is even more difficult, even perhaps unacceptable, to legislate it away.

The major policy conclusions of this paper, then, are two-fold. First, while advertising has an anti-competitive influence in certain industries, a direct attack on advertising, by itself, would not yield significant social benefits. Secondly, advertising is clearly inadequate as a source of information. Indeed, in "experience good" industries, it provides no information whatsoever. And, it may be that greater information will reduce the opportunities for product differentiation in advertising. Accordingly, it might be desirable to consider an alternative consumer information bureau subsidized by public and private sources. If it were considered desirable to restrict advertising at the same time, the media might be encouraged to perform such a role in return for subsidies designed to offset lost advertising revenues. In addition, monitoring by regulatory agencies of misleading or unfair advertising should continue, supplemented perhaps by the power to issue selective "case and desist orders". Finally, governmental legislation designed to standardize products may be useful in a limited number of areas in eliminating product differentiation.

The survey has also suggested a number of areas which also warrant further study. First, to present a clearer picture of the economic significance of advertising one should examine advertising at the distributive stage. It would be interesting to consider the incidence of "false and misleading" advertising cases across industries and at various levels in the productive process. Secondly, further research into the advertising-sales relationship is clearly warranted along with more exact estimates of the half-life of investments in advertising for specific industries. Thirdly, it is suggested that other techniques of intensive selling ought to be examined for their anti-competitive influences in markets not marked by heavy advertising:sales ratio. And, some assessment of substitutes for advertising is instituted. Fourthly, the relationship between production economies of scale and advertising economies of scale must be examined in far greater detail at both the theoretical and the empirical level. Far more attention must also be paid to the relevance of economies of scale in the multi-product and multi-plant world.

Finally it is perhaps appropriate to conclude with a very common observation. One cannot begin to assess the economies of advertising without a firm belief in one's understanding of the specific economic implications and the

broader historical significance of oligopolistic market structures. As ever, economics becomes political economy.

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APPENDIX C

MISLEADING ADVERTISING AND FRAUDULENT PRACTICES IN QUEBEC CIVIL LAW

BY

CLAUDE MASSE

CONTENTS

MISLEADING ADVERTISING AND FRAUDULENT PRACTICES IN QUEBEC CIVIL LAW

INTRODUCTION

At first glance, the problems raised for consumers by misleading advertising and certain unfair practices may appear anachronistic when attempts are made to incorporate them into the framework of Quebec civil law. On the face of it Quebec civil law, which was codified in a period when mass advertising techniques were unknown, does not deal with the problems of misleading advertising. For example, any attempt to find a reference to the concept of "advertising" in the contractual and delictual law of the *Civil Code*[1] would be futile. Nonetheless, such rules exist and may prove extremely useful in cases concerning compensation to consumers injured by misleading advertising.

As Mr. M. Trebilcock points out in the Introduction to Chapter IV of this study,[2] it has perhaps too often been assumed that the traditional rules of civil law are totally incapable of countering the civil effects of misleading advertising and that only a derogatory, statutory law can do this. To our mind, it is important to have a clear understanding of the significance and scope of the present rules provided in the *Civil Code*, while keeping open the option of dealing with unsolved problems through the adoption of derogatory provisions. Otherwise, there would be a risk of creating confusion in a legal system that has been more successful than is generally believed at adapting to the specific problems raised by misleading advertising.

We will begin with a study of the contractual aspects of Quebec civil law that deal with misleading advertising. In Part II we will study the delictual remedies available to the victim of misleading advertising when the wrongful act committed is not covered by a contract. Next, we will attempt to use the study of contractual and delictual sanctions to outline the basic principles of Quebec civil law, and to determine its weaknesses, in the area of misleading advertising. The final section will deal with our recommendations for the adoption of new measures for consumer protection, particularly in the light of the British Columbia *Trade Practice Act*,[3] the Alberta *Unfair Trade Practice Act*[4] and the Ontario *Business Practice Act*.[5]

PART ONE: CONTRACTUAL REMEDIES

I - NATURE AND SCOPE OF THE CONCEPT OF FRAUD

Definition

In civil law the concept of fraud[6] relates directly to the problem of misleading advertising and contractual fraud involving contracts concluded between merchants and their customers. In the sense of the Quebec *Civil Code*, fraud is an artifice used by one contracting party, or by a third party with the latter's knowledge, to mislead the other contracting party and induce it to undertake an obligation on the basis of this error.[7] Fraud precedes the making of the contract and affects the consent that was given to it. In the situation we are concerned with, the customer is induced to undertake an obligation on the basis of an error, whereas he would not have done so if he had known the truth, or to undertake an obligation under harsher terms than he would normally have agreed to. In civil law, fraud accordingly implies an intention on the part of one contracting party, in this case the merchant, to deceive the other party, the consumer.

It is the very existence, and particularly the integrity of the consent of the contracting party deceived, that is placed in question as a result of the fraudulent practice. The consent of one party is affected by the error deliberately induced by the other part. This situation differs from that contemplated by Art 992 of the *Civil Code*. In the latter case, the only issue is the error arising from the party relying on it, an there is no misleading practice on the part of the other party. The contracting party is then a victim of his own error. While admitting that this error may also render the contract voidable, the creators of the Quebec *Civil Code* agreed to restrict the cases in which a person could plead his own error to cases involving an error as to the nature of the contract,[8] its substance[9] or a primary consideration.[10] These restrictions are not found in cases of error caused by fraud on the part of another contracting party.[11]

It is also evident that there are no limitations *a priori* as to the type of contract that may be contested on the grounds of misrepresentation *(dol)* or misleading advertising.

We shall see that contracts of sale, whether of movables[12] or immovables,[13] of lease,[14] for the furnishing of services[15] or relating to any other obligation, may be the subject of an action for rescission, reduction of price or damages. Indeed, it is clear that all obligations may be the subject of misrepresentation or misleading advertising.

It matters little what means are employed to deceive the consumer. Here again, the intention of the *Civil Code* is not to limit its application to fraudulent practices to only one type of representation. Any form of misrepresentation, be it verbal,[16] written,[17] in the form of a notarial deed,[18] published in a newspaper,[19] reproduced in a brochure,[20] or simply posted, [21] may be grounds for damages, a reduction of the price paid, or even for rescission of the contract undertaken as a result of the misrepresentation.

In consumer law, accordingly, fraud is a practice used by a merchant, or by a third party with his knowledge, as for example an advertiser, with the intention of misleading a consumer and inducing him to enter into a contract on the basis of this error, without which he would not have contracted or would have done so at a lower price. As we shall see, the practical application of the general principle stated here is much more of a problem than the nature of the obligations at issue or the means used to deceive the consumer.

Scope of the Concept of Fraud

As will be seen, misrepresentations made in order to mislead a consumer may take several forms and cover many situations. Here we seek to determine what, according to the Quebec courts, constitutes a fraudulent practice, as opposed to a mere exaggeration which has no effect on the contract. This question must be first be studied in the light of the defendant's (merchant's) actions, then in the light of the plaintiff's (consumer's) actions. In the area of fraudulent practices, a distinction must be made between cases where the error of one contracting party is a result of direct representations and cases where the other contracting party remained passive, as in the case of an error brought about by silence. Finally, we shall examine the problem of defining the limits of liability occasioned by fraud.

Analysis of the Defendant's Actions

1 - Misrepresentation

(a) False statement and deceit

Here the fraud consists of falsely insinuating, by means of direct representations made to the contracting party, the existence or non-existence of past, present or future facts that lend qualities or a value to the goods sold or the service supplied that they do not have.

With respect to the representation of past facts, Quebec courts have held that the fact of claiming that used goods were employed to a degree other than that to which they were really employed constitutes a fraud. For example, it has been held that the fact of representing a refrigeration system as having been used for only a few months, when it had actually been used for several years, is fraud and subject to penalty.[22] The same holds true for a case where the buyer of an automobile proves that the odometer of the vehicle was turned back with the seller's knowledge, although the latter denied that the vehicle had ever been previously used as a taxi.[23] Along the same lines, a seller who has stated to a buyer that the automobile he wishes to sell has never been involved in an accident, when in fact the vehicle was seriously damaged some time earlier in an accident, is held liable for damages or rescission of the contract.[24] Representations concerning the previous production and past profits of a business are also subject to close scrutiny by the courts. If, for example, the buyer or leaseholder of a business proves that he was given falsified accounting reports, false inventory statements or a list of customers who no longer do business with the concern, or that it was generally represented to him that the business produced sizable profits when in fact it operated at a loss, then he is entitled to rescission or to appreciable damages.[25]

The fact that the seller tried to deceive the buyer as to the existence of a defect, present at the time of sale, also constitutes a fraudulent practice. The same holds true in cases where the seller of an automobile makes a verbal representation to the consumer that the used vehicle intended for the latter is in excellent condition, when it in fact has serious hidden defects.[26] The act of selling goods as new when they are used,[27] or of redating a vehicle whose year of

manufacture is earlier than the date indicated to the purchaser,[28] is also a fraudulent practice. All these considerations have a significant influence on the value of the goods at the time of sale. The same holds true for the sale of an immovable that is not as large in area as claimed,[29] or for the rental of real estate that does not possess the qualities represented by the dealer.[30]

The promise of a future act to induce the contracting party to undertake an obligation raises further problems. It has already been stated that the promise of a future act can only be fraudulent if its performance depends on the person making the promise and not on a third party, since the person deceived cannot reasonably expect a third party to be bound merely by the promise of the other contracting party.[31] However, where the other contracting party itself undertook to provide a service to the plaintiff on condition that he buy specific goods, and where that party had no intention of providing such service, our courts have held that there were grounds for rescission on account of misrepresentation, or for damages because of failure to fulfill the obligation.[32] The same holds true in cases where the vendor of a building lot represents to the consumer that various services will be available to purchasers for their recreational activities (pool, golf course, park, and so on).[33] It is then possible to bring an action on the grounds of misrepresentation for performance of the obligation.[34]

Fraudulent practices may relate not only to past, present or future acts affecting the scope of the contract, but also to the very nature of the obligation undertaken. In such a case, the Court does not hesitate to order rescission of an obligation where a contracting party was led to consent to one legal act when he believed that he was consenting to another, as a result of fraudulent practices on the part of the other contracting party or a third party. This was the basis for rescission of contracts for the purchase of construction materials and services, in a case where the consumer believed that he was consenting to a simple advertising promotion campaign,[35] and for the cancellation of obligations in a case where the signer acted as security, though it had been represented to him that it was only a question of a letter of reference.[36]

Generally, it is not necessary for the defrauded party to prove that the other contracting party was aware of the

fraudulent nature of its representations, if the facts presented were fraudulent through negligence, by the fact of "excessive zeal",[37] or if it may be presumed from the nature of the seller's business that the latter could not be unaware of the deceptive nature of his statements.[38] The important point is that the representations made by means of advertising campaigns on the part of the seller or lessor are not substantially in accordance with the facts. It is therefore of little importance whether the merchant consciously intended to deceive the consumers.

(b) Silence and non-disclosure

From the preceding it may be concluded that a fraudulent practice occurs whenever misrepresentations were made that misled a contracting party. The problem of knowing whether one can base an argument on the fact that a merchant remained silent as to the defects of goods sold, or an important aspect of a transaction, is less simple. This is negative fraud.[39]

It is generally held that this is not a fraudulent practice since the latter can only occur when there are direct formal representations on the part of one of the parties.[40] The fear exists that a contrary solution would result in destroying the security of business transactions by obliging the seller, for example, to disclose an important fact, without being able to define in each case what is meant by "important fact":

> (TRANS) ... can the silence of a contracting party be fraud? In principle, it cannot. The concept of fraud by its nature involves an activity, an act; it is hard to reconcile with a failure to act. For example, the purchaser on credit who does not disclose his insolvency is not committing a fraud. Here again, however, and wherever fraud is in question, this principle is governed by the facts. Silence may become constructive fraud depending on the circumstances. Thus, as soon as total silence is broken, no further concealment is allowed:the buyer on credit who represents himself to be solvent must do so in all truth, otherwise he is committing fraud by misleading the other contracting party on this matter. It is the duty of a contracting party who discloses a part of the truth to make a full disclosure;if he does not, any inaccur-

> acy as to the facts can be imputed to fraudulent non-disclosure.[41]

Under this interpretation, total silence is allowed, but not half-truths or failure to disclose all the facts. When one of the parties begins to disclose an important fact, it must make a full disclosure, and not deal only with the aspects that are favourable to itself.[42]

The courts appear to have made an important modification to this principle, in cases where an immovable is sold without the seller disclosing the existence of concealed servitudes or of building restraints. In this case, it was held that the purchaser may seek rescission of the sale or damages resulting from fraud on the part of the seller, where the servitudes were not apparent and could not be detected during an inspection of the premises.[43] Likewise it was held that the seller of a lot must disclose to his purchaser the existence of a building restraint.[44] This modification to the rule that the contracting party's silence is not fraudulent in nature seems to have been applied only by way of an exception to other types of obligation.[45]

2 - Simple exaggerations or *dolus bonus*

The requirements imposed on the party making representations for trading purposes do not go so far as to oblige it to remain neutral with respect to the quality of the products sold or services offered, or to disparage the object of the sale. It appears that certain practices of varying degrees of fairness are tolerated, and that a blind eye is turned toward a certain kind of mis-statement when it apparently causes no harm to the consumer, and that these practices are in fact accepted sales techniques in the business world.[46] Accordingly, some authors give the seller the right to (TRANS) "exaggerate the value of his merchandise", since (TRANS) "such habitual commendations fool no one, the buyer is forewarned of them and it is up to him not to be foolishly taken in".[47]

Some writers have noted that this attitude is the legacy of a society in which contractual relations were much more restricted than they are now, and in which it was easy for a buyer to check the truth of any claims made to him.[48] Unfortunately these permissible exaggerations may already have reached the point of completely destroying the credibility of mass advertising, whenever anything but a factual approach is

involved.

Is not the art of presenting just one aspect of a product, and giving a certain slant to its presentation, the modern equivalent of the *dolus bonus* of the nineteenth century? What could then easily be checked out has become an intangible for today's consumer. For example, who can verify at home the pseudo-scientific claims made about the quality and properties of products? There is a danger that these "habitual claims (that) fool no one" have become daily pitfalls, especially by reason of the nature and new scope of advertising promotion techniques used as "polish".

While the Quebec courts admit that a product may be commended, they have agreed to impose strict limitations on the extent to which "business zeal" may be carried:

> (TRANS) While a seller is certainly not obliged to disparage his merchandise and may even 'polish' it somewhat, or, if desired, moderately exaggerate its actual qualities the law prohibits fraudulent practices, namely those which cause error in the mind of the other contracting party and make it decide to act.[49]

While, therefore, it is permitted to try to convince a consumer by using current advertising techniques,[50] the truth must be respected whenever material representations regarding the facts relied on are made.[51] Our courts insist on stepping in and penalizing fraud, whenever one contracting party was misled by misrepresentations as to the facts.

Analysis of the Plaintiff's Actions

It is not enough for the victim of fraud to prove to the Court that misleading representations were made to him and were the basis for his undertaking the contract. The plaintiff must prove that he acted prudently, on the strength of reasonable and credible representations, that he checked the truth of the information given him wherever this was reasonably possible, taking into account his experience and knowledge. A consumer who merely proved that a merchant took advantage of his gross naivete would have great difficulty in getting his rights recognized.

The decision as to what constitutes the necessary

prudence is made by the Court in each individual case, according to the circumstances. Thus, if the victim was in a position to check the truth easily, to verify the representations made to him and the nature of the obligation proposed, but did not do so, he has only himself to blame.[52] This strictness on the part of the courts is especially evident in cases where the importance of the obligation undertaken should have made the defrauded party think twice and act more prudently, since the courts do not require verification of obligations of minor importance.

Accordingly, an experienced businessman who has brought a business without consulting the balance-sheets, tax returns and order books produced for or available to him, cannot base his argument on fraud by the seller if he relied on verbal representations.[53] Nevertheless, a businessman who requested to see the accounting statements and who was told that they had disappeared in a fire, can plead the fraud of the other party[54] since he did not neglect to make inquiries.

The consumer who merely proves to the Court that he relied solely on the verbal representations of the merchant, without reading the contract that he signed, will be in an extremely poor position to rely on misrepresentations made to him if, by a simple reading of the contract, the error could have been dispelled.[55] The same is true for the buyer of a vehicle who was able to check and examine the automobile sold to him at his leisure, but did not do so.[56]

The degree of prudence required of the contracting party is determined for each individual case. The courts show much more leniency with respect to a contracting party that was misled by reason of his inexperience,[57] or did not read the contract because he could not read.[58] On the other hand, the experienced businessman must display more prudence than that required of the ordinary consumer.[59]

Definition of the Limits of Liability Occasioned by Fraud

At the time of signature of a contract made as a result of fraudulent representations, it is often found that the party responsible for the fraud has been careful to stipulate that it cannot be bound by any representations other than those contained in the written agreement. The contracting party

responsible for the fraud thereby endeavours to avoid the consequences of its representations and limit the extent of the scope of its fraud. It is customary to find the type of clause stating:

> (TRANS) No verbal or other representations made by any person shall be or is at present binding on the company, unless it is contained in the text itself of this acceptance.[60]

Reading the contract in question often discloses that it no longer contains the representations that were made to the contracting party in order to induce it to undertake the obligation.

The Quebec courts regard this clause restricting the effect of the representations made as being in itself a deceptive practice. The Court of Appeal has held that any representation made to induce a contracting party to undertake an obligation, whether by means of pamphlets, advertisements or any other form of promotion, is part of the contract and binding on the party using it, just as if it had been expressly stipulated.[61] It therefore seems that the only effect of the *Consumer Protection Act*[62] of Quebec in this respect was to give concrete form to well-established precedent, when it stipulated that any goods supplied by merchant must correspond with the description given of them in contracts, catalogues, circulars and by other means of advertising.[63] The Act also states that any warranty in a merchant's advertising concerning goods is considered as being part of the contract of sale of these goods.[64]

Finally, there is the problem of the effect of the immunity clauses in which the seller of an immovable attempts to avoid liability resulting from a concealed servitude affecting the property sold, or from concealed defects in the goods sold. In accordance with well-established case law, the Quebec courts have decided that the seller is presumed to be aware of defects in the goods he sells,[65] and of the servitudes affecting his immovables,[66] and that, knowing them, he cannot, without being guilty of fraud, stipulate that he shall not be bound by any warranty in respect of them.

It must accordingly be concluded that whenever it is a question of studying the fraudulent practices that one contracting party may have used to deceive the other, Quebec

civil law does not recognize the validity of contractual clauses than attempt to restrict the application of any representation made for the purpose of absolving the seller concerned of any liability.

II - CONDITIONS FOR THE EXERCISE OF A REMEDY IN DAMAGES OR FOR RESCISSION ON GROUNDS OF FRAUD

When bringing an action to rescind a contract entered into as a result of a fraudulent practice, or an action for damages on grounds of fraud, the plaintiff must satisfy a number of conditions prescribed by the law. In particular, he must assume the burden of proving that the impugned action constituted a fraudulent practice with regard to him; he must not have subsequently ratified the contract that was entered into; and finally, he must show that the fraud had a decisive influence on his consent to enter into the contract, and that the fraudulent practice was perpetrated by the contracting party or by a third party with its knowledge. Lastly, there is the problem of restitution to the parties following a possible rescission of the contract. We shall examine these problems here.

Burden and Form of Proof

Since bad faith on the part of the other contracting party can never be presumed,[67] it has often been held that the party claiming to have been misled is responsible for proving the existence of fraudulent practices on the part of the defendant,[68] and that, in the absence of a preponderance of evidence to that effect, the contract must be upheld.[69] Consumers often fail on this burden of proof.[70]

The main point of controversy regarding the evidence that must be presented by the plaintiff concerns the type of evidence that can be given against a written contract. It is necessary to determine whether the contracting party who is alleging fraud by the opposing party can offer testimony to contradict the written contract concluded between the parties, and show the existence of misrepresentation, verbal or otherwise, at the time the contract was concluded. At first glance, it seems that the answer must be in the negative, since Art. 1234 of the *Civil Code*, in the chapter on proof, seems to rule out all testimony to contradict a written document:

> Art.1234: Testimony cannot in any case, be received to contradict or vary the terms of a valid written instrument.[71]

This interpretation was accepted by our courts at the time of the codification[72] and some decisions still seem to support it now, although indirectly.[73]

However, this intepretation is no longer accepted by the great majority of writers,[74] and it is contradicted by a large number of decisions in our superior courts.[75] It has been noted that Art.1234 of the *Civil Code* is applicable only when the written agreement has been validly concluded between the parties, and that proof of fraud has the effect of impugning the very validity of the document. Since fraud is a legal fact, it can be proved by any type of evidence.[76] The party contesting the validity of a written agreement on account of fraud is thus allowed to give testimonial evidence to prove that false representations were made and that it was misled by these practices. Such evidence may even be produced against an authentic deed: it is not necessary in such cases to proceed by means of an action for fraud.[77]

The only problem now remaining in this regard is to determine whether the Court can require that a party giving its own testimony regarding misrepresentations made to it shall also corroborate its testimony. It is now well established that a party submitting evidence that it has been misled must support this claim with other testimony or proof of facts which corroborate its own testimony. It is therefore necessary that conclusive evidence be given in that regard.[78] Otherwise, our courts feel it would be too easy to allege the existence of fraud, and this would threaten the security of contractual arrangements.[79]

Finally, it is noted that the burden placed on the plaintiff to prove that he has been misled, and present factual evidence corroborating his testimony, is very often lightened by the lesionary nature of the transaction in question. It is felt that proof of the lesionary nature of the transaction amounts to corroboration, since the plaintiff's acquiescence is only explainable in such a case by the alleged misrepresentation.

> (TRANS) In seeking to determine the extent of the misrepresentation and the effects it can have in, as it were, 'forcing consent', a criterion emerges - lesion. It is not that lesion is grounds for nullity,

> but it can serve as a standard or measurement in determining the influence that the misrepresentation exerted in securing consent.[80]

The lesionary nature of the contract thus becomes a supplementary factor enabling the Court to decide whether it is probable that the contracting party could have given valid and informed consent apart from the hypothesis of misrepresentation. When the imbalance between the reciprocal benefits of the contract is such that it is not possible for a reasonable person to have given his consent without having been misled or induced into error, the Court will conclude that this situation corroborates and lends plausibility to the plaintiff's testimony that he was misled.[81]

In general, then, it must be concluded that a consumer wishing to bring an action for rescission of a contract, or for damages on grounds of fraud, must prove that such fraud exists. He may do so by giving testimony, even to repudiate a written agreement. Proof that the agreement concluded between the parties is lesionary may then serve to corroborate the plaintiff's testimony.

Non-ratification

A contract concluded as a result of fraudulent practices is not void but voidable, since fraud on the part of a contracting party is a basis for relative, non-absolute nullity.[82] It is therefore necessary to apply formally for rescission of the contract or for damages; otherwise, the contract will continue to have full effect. From the application of this principle it follows that a contract entered into as the result of a fraudulent practice may be ratified formally or absolutely by the consumer. Tacit ratification consists in a fact which necessarily implies waiving a right of action for rescission or damages. We shall clarify here what constitutes a fact implying ratification, but it is important to observe at once that there can be no exercise of the remedies from fraudulent practices if the contract has been ratified. In practice the problem of ratification acts as an estoppel to a good many remedies enjoyed by consumers.

Our courts have dealt at length with the problem of the ratification of contracts entered into as a result of fraudulent practices. In general, the party complaining of

fraudulent practices must have applied for rescission of the contract or for damages as soon as it became aware of the misrepresentation that misled it. Two types of situations may arise in this case: situations where mere disclosure of the truth enables the contracting party to gauge the full extent of the error that was caused, and situations where knowledge of the fraudulent practices can only be acquired gradually. In deciding whether the contract has been ratified, the Court considers only the length of time elapsed and the events that have occurred since knowledge of the existence of the misleading practices was acquired.

In the first type of situation, where mere knowledge of the fraud makes it possible to gauge the full extent of the error induced, Quebec courts require that the misled party bring an action for rescission or for damages at the earliest possible opportunity after a reasonable period for reflection.[83] A party that waits many months before acting will be deemed to have ratified the transaction implicitly.[84] Length of the time elapsed since the transaction is not the sole criterion abling the Court to decide whether the contract has been ratified. The Court also takes into account the fact that the misled party did not allege the presence of misleading practices until it was itself sued for repossession of goods sold on instalment or for payment of its debt. A party that then merely pleads that it was misled when entering into the contract, but has remained passive since that time, will be deemed to have ratified the contract.[85]

The same is true in the case of a party that sues for rescission or damages within a reasonable time, but continue to use the goods purchased as a result of the fraud until the judgment,[86] or who sells the goods purchased before judgment is rendered.[87] There is then implied ratification of the first contract entered into.

It is found that in practice the party seeking to impute fraud to its opponent must satisfy very strict requirements in many cases. The party that has been misled must bring an action as soon as it has full knowledge of the misleading practices and must cease using the goods that will be the subject of the action until the judgment is delivered. In view of the length of legal proceedings and the investment involved in the purchase of a house or car, it must be concluded that this rule runs counter to the interests of con-

sumers, who by definition have very few alternative solutions. One has only to consider the cost and risk involved in storing a vehicle that is the object of a fraud action for many months or even years to realize that these are excessive requirements for the majority of consumers.

In cases where the nature and extent of the misrepresentation can be learned only gradually, the courts are less demanding with regard to the time elapsed between the date the contract was concluded and the action for rescission or damages. This situation is frequently encountered in the sale of a business as the result of misrepresentation. The person who buys a business on the strength of fraudulent financial records must be able to hold it for a certain amount of time before he is able to realize the falsity of the representations and their extent. The Court therefore allows the plaintiff to operate the business for up to a year before bringing an action, since the value of a business can only be judged on the basis of a year of operation.[88] However, these are exceptional situations.

Determining Character of the Fraudulent Practice

It follows from the wording of Art.993 CC that the fraudulent practice must have influenced consent to the contract, that is, it must have involved a consideration without which the contracting party would not have contracted:

> Art.993: Fraud is a *cause of nullity* when the artifices practised by one or with his knowledge are *such that the other party would not have contracted* without them. (Emphasis added.)

This interpretation is logical and finds its fullest application in cases where the normal sanction for fraud is simple rescission of the contract. It is logical to require this when the absence of consent involved a major consideration. It must be apparent, therefore, that without the fraudulent practices the party challenging the validity of the contract would not have contracted.[89] Only primary fraud can give rise to recission in this case.

An important problem remains, however. Often, the fraudulent practices involve considerations which are secondary to the contract, but which are nevertheless important to the

contracting party - for example, the amount of prior use of the property, its year of manufacture, the price reductions agreed on, the condition of the property or its state of repair. It is presumed, in such cases, that the consumer would have contracted anyway, but on more advantageous terms. There is then a case of incidental fraud. It only influenced acceptance of the terms of the contract, but did not directly influence the principal consideration.

> (TRANS) Incidental fraud is that perpetrated in the course of a transaction already initiated. Its purpose is not to induce one of the parties to contract, but only to induce it to accept terms which it would not accept if it were not misled.[90]

Incidental fraud is therefore apparently not covered by Art.993, which applies only to cases where the fraud involves a principal consideration. It is necessary in such cases to seek damages in a delictual action based on Art.1053 of the *Civil Code*. This remedy does not entitle the plaintiff to rescind the contract, but only to claim damages resulting from the fraudulent practices.[91]

It follows from the foregoing that only in cases where the plaintiff sues for rescission of the contract is it necessary for him to prove that fraudulent practices influenced the principal consideration, without which he would not have contracted.[92] In the case of an action for damages, it is only necessary to prove the extent of the damages. This is also the case for an action to reduce the price, which, as we shall see, can also be admissible in a claim based on incidental fraud. This interpretation is now commonly accepted by the Quebec courts.[93]

Participation of the Contracting Party

Pursuant to section 993 of the *Civil Code*, it is necessary that misleading advertisement or, more generally, frauds, have originated from the contracting party or from a third party with his knowledge for a recourse in annulment or contractual damages to be possible. This requirement seems paradoxical since the *Civil Code* mainly deals with fraud and its punishment to the extent that it affects the consent of a contracting party.[94] The fact that the fraud has originated from the contracting party or from a third party without his knowledge does not change anything to the fact that it is the

consent itself of the defrauded party that has been vitiated, notwithstanding the origin of the false representations. It is for this very reason that the *Civil Code* punishes the error, even when it originates from the party that invokes it. It is the case of error on the nature of the contract, its substance, or a principal consideration under section 992 which deals only with cases where the party itself made the error. Therefore, it is somewhat surprising that, in appearance, the requirements be stronger for a mistake originating from a third party, whoever he is, than from one that is caused by the person who invokes it.

In view of the numerous remedies open in cases of fraud, we will see that the problem might be more theoretical than real.

The Quebec *Civil Code* requires that the misleading artifices be practised by the contracting party or a third party with his knowledge.[95] Thus, annulment of the contract will be denied if the reason invoked is that a person who is not party to the contract made misleading representations. Two significant examples of the application of this principle can be found in recent decisions of the Montreal Provincial Court. It was decided in the first case that the assurances made by a cleaning appliances seller to the effect that he would give cleaning contracts to the buyer of his appliances are not binding on the finance company who extended a loan to the buyer enabling him to buy the said appliances, since this company was not aware of the representations made to the buyer.[96] It was also decided that he who buys a truck on the strength of newspaper advertisements to the effect that this purchase would give him a right to transport contracts cannot request the annulment of the contract if it was made with a dealer who was not aware of the representations made by the author of the advertisement, the latter not being the dealer's representative.[97]

The consumer who wants to prove that his co-contracting party was aware of the existence of fraudulent artifices practised by a third party, will be faced with yet another obstacle than the requirement mentioned above. In fact, it is almost impossible to prove in most cases. Experience reveals this proof to be much too difficult.

However, if the contracting party is not bound by false representations made from third parties without his

knowledge, he is still bound by representations made by his agents, even in cases where he was not aware of them, since they represent him. Thus, it was decided that representations made by real estate brokers or agents bind the seller and may lead to the annulment of the contract or to damages.[98]

The *Civil Code* requirements to the effect that false representations must have originated from the contracting party or a third party with his knowledge, do not deprive the misled party of the right to take damage action against the author of false representations who is thereby responsible of a quasi-offense[99] *(1053 Civil Code)* or to request the annulment of the contract when the error thus provoked comes under section 992[100] in cases of error in the nature of the contract, its substance, or a principal consideration, since this provision does not contain the same requirements as section 993.

This last remark is most important, since it allows us to conclude that the misled consumer can, in most cases, have effective recourse even in situations where false representations are not the fact of the co-contracting party or of a third party with his knowledge.[101] The provisions of sections 1053 and 992 of the *Civil Code* provide an effective remedy when the co-contracting parties involvement in the fraud may be lacking as regards the application of section 993.

Restoration

As a rule, when the party that has been the victim of fraud requests the annulment of the contract, it must be in a position to restore the object of the transaction in the state it was at the moment the contract was made. The obligation to restore would come from section 1087 and 1088 of the *Civil Code*.[102] This requirement is compulsory in cases where the plaintiff invokes section 992 *Civil Code* for an error originating from himself. This is to avoid the contracting party who had nothing to do with the error being the only one to pay for the lack of know how or experience of this co-contracting party.[103] Especially in view of the particular nature of the action for annulment, it was intended to extend this requirement to cases where the plaintiff is the victim of an error made by others.

Even if they have never directly rebutted the grounds for this principle, which can be most disputable in cases of

fraud, our courts did not intend to strictly bind the victim to this requirement.[104] In cases where the value of the merchandise sold further to false representations has been considerably diminished because of the existence itself of the fraud committed by the defendant, the Quebec courts declared that the responsible party had only himself to blame and that there was no reason to apply this principle, since otherwise the victim would be prevented from exercising his rights because of the defendant's offence itself. Numerous decisions support this opinion.[105] These decisions seem even more equitable since the author of fraudulent artifices could himself jeopardize what he has received as counterpart in the transaction to prevent any annulment, in the event that the restoration requirement was enforced to the letter.[106]

III - THE SANCTIONS FOR FRAUD

Annulment

Annulment is the only punishment explicitly provided by the *Civil Code* in cases of fraud.[107] As already seen, annulment is limited to cases where the false representations concerned the principal consideration of the contract or a condition without which the contracting party would not have agreed to the contract.

Pursuant to section 2258 *Civil Code*[108] the annulment is subject to a 10-year prescription and is only available to the victim since the intended annulment is only relative. It is the most common punishment enforced by our courts.[109]

Price Reduction

The possibility of granting a price reduction *(quanti minoris)* instead of an outright annulment was and still is to some extent the object of a very heated controversy as regards doctrine and jurisprudence in Quebec. Seeing that the victim of misleading advertisement or fraudulent artifices does have any interest in requesting an outright annulment in many cases but rather a price reduction, some wanted to apply to fraud cases the principle of warranty against latent defects provided by section 1522 et seq. of the *Civil Code* and this, within the dealer's responsibilities. Indeed, it is noted that in these cases, the misled buyer would still have agreed to the contract if he had known the truth, that he would have done it while requesting a lower price, or that the annulment and the restoration may be more harmful to him than to the dealer.

The question is to know whether the purchaser who does not want or cannot request an annulment of the contract can ask for a price reduction, thereby insuring that his total obligation is equivalent to the effective equity of the contract. This option is most interesting for the purchaser. Indeed, the provisions of the warranty against latent defects provided by section 1522 et. seq. of the *Civil Code* considerably simplifies that task of the plaintiff in a case of fraud. These sections provide that;

Section 1522: The seller is obliged by law to warrant the buyer against such latent defects in the thing sold, and its accessories, as render it unfit for the use for which it was intended, or so diminish its usefulness that the buyer would not have bought it, *or would not have given so large a price, if he had known them.*

Section 1523: The seller is not bound for defects which are apparent and which the buyer might have known of himself.

Section 1524: The seller is bound for latent defects, *even when they were not known to him,* unless it is stipulated that he shall not be obliged to any warranty.

Section 1526: *The buyer has the option of returning the thing and recovering the price of it, or of keeping the thing and recovering a part of the price according to an estimation of its value.*

Section 1527: *If the seller knew the defects of the thing, he is obliged,* not only to restore the price of it, *but to pay all damages suffered by the buyer.*

He is obliged in like manner in all cases, in which he is legally presumed to know the defects.

Section 1528: If the seller did not know the defects, or is not legally presumed to have known them, he is obliged only to restore the price and reimburse to the buyer the expenses caused by the sale.

(Emphasis added)

As can be seen, the use of the warranty against latent defects gives the consumer three possible recourses. The consumer or, in a more general way, the misled contracting party, "has the option of returning the thing and recovering the price of it (cancellation) or of keeping the thing and recovering a part of the price according to an estimation of its value (price reduction)". A third recourse is possible. If the seller knew the defect of the thing, "he is obliged not only to restore the price of it, but to pay all damages suffered by the buyer".

Even if it can be seen immediately that it is difficult to equate an action for fraud and an action for latent defects in all cases, it is certain that the multitude of recourses provided in the case of latent defects is better adapted to the needs of the defrauded parties than is the case with the sole cancellation on grounds of fraud provided by section 993 *Civil Code*.

Some believe, and rightly so, that the defrauded party should not be limited in its recourses and that the action for price reduction is more equitable. Even if the acceptance of this principle now appears to be general, this extension of warranty rules governing latent defects to cases of fraud was not made without opposition, and it is still giving rise to substantial problems within a new legislative policy.

One trend was to impose strict limits on or even make impossible the recourse to an action for latent defects in a case of fraud. At first, this position appears to be more in line with the *Civil Code's* coherence and internal logic since the action for price reduction pertains more to a breach of contract than to a preliminary defect of consent. However, it leaves the contracting party without any other recourse than outright annulment or damages (1053 *Civil Code*).

> When the damages suffered are only a decrease in value of the object of the contract, the only remedy is a request for annulment. For other damages, fraud, with its offending feature, adds an action for compensation that we could encounter in the chapter on error.[110]

For a very long time, the Quebec jurisprudence was based on a decision rendered by the Supreme Court[111] at the beginning of the century to refuse actions in price reduction. The case in question is *Pagnuelo vs Choquette*, which deserves particular attention at this point. In that matter, the seller of five apartment buildings made false representations to the buyer to the effect that the said buildings were built of solid stones while a great part of them was made of wood covered with bricks and stones. The seller could not be unaware that his representations were false since he was the builder of the said buildings. The misled buyer instituted an action to have the sale annulled, which the Quebec Superior and Appeal Courts refused on the grounds that the best remedy was an action in

price reduction and that it was impossible to have both parties restored. Seeing that the fraud had been proven and that the buyer would not have acquired the buildings if he had known how they had been built, the Supreme Court of Canada concluded that since the matter came under sections 991 and 993, it had no other choice than to grant outright annulment of the contract, and this, contrary to the pretentions of the defendant and the inferior courts since it is the only recourse provided by the Code:

> There is no choice, these sections require that the judge annull the contract.
>
> It is evident that the recourse reserved by the court is action for price reduction or damages. But this recourse is only given in cases of latent defects, and does not exist in cases of error or fraud.
>
> Section 1000 is categorical. It only provides for an action in annulment.[112]

Paradoxically, it is on this decision, intended to favour the misled buyer at the expense of the seller who wanted to make only a price reduction for his false representations, that a long series of decisions were based, refusing to grant an action for price reduction to the victim who cannot or will not request annulment.[113]

If there could have been any ambiguity on the effective scope of the *Pagnuelo vs Choquette* order, it can be seen that the following decisions took a clear position against the idea of extending the action for price reduction to cases of fraud, thereby making a clear distinction between both situations:

> The buyer who maintains that he has been induced to enter into a contract of sale by fraud or error does not have the option between having the sale cancelled and recovering the price on one hand and keeping the thing at a reduced price on the other, except on the case of 1501 and 1526 *Civil Code*.[114]
>
> In 1955, two most important decisions were the turn-

ing point against this orientation.[115] It was then the custom of the Courts to give the victim of false representations the right to avail himself of all the recourses provided by the *Civil Code* when these recourses could be applied to situations similar to fraud, and this, notwithstanding the "silences" of section 993 and 1000 of the *Civil Code*. Indeed, it could be held that what constitutes a fraud on the part of the one who is responsible for false representations is a latent defect for the victim of the same representations:

> According to our jurisprudence, it is true that the quanti minoris action is limited to cases provided for in sections 1501 and 1526 *Civil Code*, the latter concerning a sale affected by defects, but the borderline between latent defects and error is difficult to establish and is of great importance (...). Hasn't a fraud on the part of the defendant become a latent defect for the plaintiff?[116]

In *Manseau vs Colette*, we can see precisely the unjust feature of annulment as the sole punishment for fraud. In that case, the victim had bought an insurance firm and had moved with his family to the locality where the seller was in business. The sole annulment of the sale would have deprived the plaintiff of his new trade, even if this trade was less lucrative than represented, and would have been a major inconvenience for the whole family, forced to move again.

The Quebec jurisprudence is now clearly established to the effect that a misled buyer, as defined here, can avail himself of an action for price reduction for latent defects. Thus, it was decided that an action for price reduction could be received when the seller of a car made representations to the effect that the said car was in good working order when it was not. The defects of the vehicle will then be considered as latent defects and the consumer will be in a position to obtain from the court the reimbursement of the price paid for repairs.[117]

> In spite of a certain jurisprudence to the effect that fraud would only allow an action for contract annulment, it has evolved and it is now admitted that the victim of a fraud *who will not or cannot request* the annulment can request a price reduction or damages.[118]
>
> (Emphasis added)

This interpretation was used in many other situations in which sellers[119] and consumers[120] had been misled on the quality of the goods.

Even if the action for price reduction is more respectful of equity than the sole recourse for annulment, we must concern ourselves about certain abusive uses of the concept of latent defects in cases where an action for damages 1053 *Civil Code* would permit the same solutions but would show more respect for the nature of recourses. It is surprising that, for example, an action in price reduction could have been granted for latent defects in cases where the goods sold did not suffer from a "defect" under section 1522 *Civil Code*, but simply did not correspond to the representations made by the seller. Thus, an action for price reduction was granted in numerous cases where a new car had been re-dated to give it a market value that it did not have.[121] Of course, it is only fitting to grant damages to a car buyer who paid more because he thought he was getting a recent model but one can wonder whether the fact that the car is of a particular year rather than another constitutes a latent defect under section 1522 *Civil Code*, where the car is in perfect working condition. By doing so, there is a risk of completely distorting the concept of "latent defects" contained in section 1522 *Civil Code*, when the action for damages is the most coherent legal recourse.[122]

Finally, it should be noted that the abusive use of actions for price reduction in cases of latent defects within the meaning of section 1522 *Civil Code* et seq, has other major disadvantages, one of them being its inapplicability to cases where false representations concern "apparent defects".[123] The victim of this type of representation runs the risk of being in a most difficult position. Furthermore, and this is a substantial argument, the use of the latent defects recourse would only be applicable when the false representations pertained to "a thing or its accessories", since the concept of latent defects cannot apply to services. There is thus a danger of neglecting all false representations that do not concern goods, thereby neglecting the services sector as a whole.

These considerations lead us to believe that an action for damages (1053 *Civil Code*) is the best recourse when the victim will not or cannot avail himself of its right to request the annulment of the contract pursuant to sections 993 and 1000 of the *Quebec Civil Code*.

Damages

Under section 1053 of the *Civil Code*[124] it is an offence to commit a fraud and it is recognized that the victim of false representations can make use of the rights and recourses granted by the delictual responsibility system.[125] Even if this recourse is recognized, there is, however, a problem as regards its scope and application. Trudel would like to limit the action for damages to extra-contractual damages:

> But these damages must be distinct and independent from the objects and considerations of the contract. As regards these strictly contractual disadvantages, the sole and total indemnity is provided for and organized by the Code: it is the annulment of the contract. Under pretexts of indemnity, it is impossible to use fraud to modify an agreement and impose to one of the contracting parties a clause to which he did not consent.[126]

Other authors only limit the action for damages to cases where false representations constituted an incidental fraud.[127] Finally, others seem to accept the action provided by section 1053 *Civil Code* without any restriction.[128]

It will have been noted that the question which interest us here is the possibility of using delictual action as a supplement within the framework of contractual damages. It is the problem of option in civil law, which is generally improperly referred to as "cumulation". The question raised by the option is to know if the victim can always choose the delictual system provided by section 1053 *Civil Code*, even if he made an agreement with the author of the damages which is not absolutely null and the damages originate from a contractual error on the part of the opposing party. It is then a question of knowing if contractual damages can always be considered as delictual damages when the contractual error may constitute a delictual error as in the case of false representations.

For the problem of option or "cumulation" to exist, there must be three necessary conditions: the contractual relations between the parties must be valid, the offence which is the object of the action must be within a contractual

framework, and there must be a practical interest in distinguishing between a contractual recourse and a delictual one.[129] Even if the third condition is satisfied here, i.e. a practical interest to the distinction, since the use of the delictual action gives a right to damages when a contractual recourse seems limited only to annulment,[130] we should ask ourselves whether the two other conditions are satisfied in a case of fraud. First of all is the contractual relationship between the parties which results from fraud "valid", in the sense we give it here. We believe that this requirement only concerns cases where the contract is not valid because of absolute nullity, where it is, for example, the capacity of the parties to sign a contract which is the problem.[131] Annulment for fraud is, as we have seen, only a case of relative nullity where a valid contract can be had further to a ratification, for example. Furthermore, it seems that the second requirement is met since the *Civil Code* itself deals with false representations within the framework of the contract and its drawing up. Consequently, there is good reason to believe that the problem of the option does exist in the present case.

To refuse the possibility of option is to deny the misled contracting party the opportunity of availing himself of the right to sue for damages provided by section 1053 *Civil Code*; to give it to him is to add to the action for annulment the possibility of claiming damages caused by the opposite party.

Essentially, concerning the acceptations or refusal of the option, two unequal trends have developed among Quebec jurists. The first attitude, adopted by the majority of legal writers, would dismiss the possibility of option.[132] It is generally believed that admitting the option would be killing the compulsory nature of a contract and putting its effects at the suppletive level. A second attitude would like to see in section 1053 *Civil Code* a public provision pre-existent to the contractual obligation.[133] These would then be basic provisions, that the contracting parties cannot ignore or sidestep, and that are superimposed on the contract.[134]

For reasons of basic justice such as those we have seen in the matter of punishment for fraud, our courts now generally accept the possibility of option, thereby rejecting the opposite doctrine's arguments. This trend seems to have gathered much strength in the past few years.[135] As regards

fraud, Quebec courts have been accepting for a long time the suit for damages based on section 1053 *Civil Code*.:

> The Court of Appeal declares that the defendant Adelson could not require the plaintiff to request the cancellation of the contract to which he was not a party and that, *fraud being an offence, this was a case for damages*.[136]
>
> (Emphasis added)

Thus, notwithstanding any contract cancellation, Quebec courts grant damages as reparation for the effects of false representations.[137] Certain people seem to have wanted to restrict this possibility to cases of incidental fraud only.[138] This position remained the fact of a minority. Finally, it is noted that our courts even grant damages suppletively to outright annulment when it would not be enough to compensate all the damages suffered by the victim,[139] more particularly for troubles and inconveniences. Finally it should be noted that even in a case of fraud, compensation should only be granted in proportion to immediate and direct damages.[140]

IV - DAMAGE SUITS IN MATTERS OF MISLEADING ADVERTISING

It is frequently heard that a recourse for annulment or reduction of liabilities may be available on grounds of lesion to consumers subjected to misleading advertising. We do not think that this assertion has any validity whatsoever since the concept of lesion has nothing to do with representations made to convince a given party to sign a contract. In this instance, section 993 should be applied.

In civil law, the concept of lesion only concerns itself with the results a transaction may have for a party. Strictly speaking, "the lesion is nothing else than an imbalance in the economy of a contract caused by the inequality between the parties' mutual performances. Thus it is an economic error, assumed and unwanted, on the value of the promised performance"[141]. In the wider sense, lesion is "the financial damage suffered by a contraction party due to a legal action".[142] A transaction may cause lesion, without having been entered into in bad faith, or as the result of fraudulent intentions or practices by either of the parties.[143] Lesion is linked to the results of a transaction and not to the representations that may have led to it such as in the case of the concept of fraud.

With exceptions,[144] recourse for lesion is not open to persons of the age of majority in the *Quebec Civil Code*. In 1971, the *Consumer Protection Act* promulgated the adoption of the principle of annulment or reduction of the defrauded consumer's obligations.[145] This provision is difficult to qualify in the sense of the traditional concept of lesion since it deals with cases where the seller "exploited the consumer's inexperience", but, in fact, it is an extension of the recourse for cause of lesion to cases where persons of the age of majority contracted with the seller. This is very important exception to the principle contained in section 1012 of the *Civil Code* whereby: "persons of the age of majority are not entitled to relief from their contracts for cause of lesion only." However, the waiver provided in this regard by the *Consumer Protection Act* is far from having all the importance that could be assumed by simply reading section 118 of the said Act. The "contracts" subjected to this provision are only those that involve credit and those made with an itinerant seller.[146]

PART TWO - DELICTUAL REMEDIES

We have noted that delictual remedies could be used as suppletives when a contract has been made. The situation contemplated here is the one in which misleading advertisements or fraudulent artifices have been used, but did not result in a contract. In some instances, the consumer would have an interest in suing the author of these false representations since even if no contract was made, he suffered damages because of them. The situation presents itself, for example, when a seller advertises an item he has no intention of supplying or which he intends to supply only in such a quantity that he will not be able to satisfy the demand created by the advertisement, with a view to attracting the public and trying to sell current articles. This technique is commonly referred to as "bait and switch selling". In such a case, the consumer had to go to the commercial premises to buy the advertised merchandise but could not do so due to the seller's deceptive artifice.

In such a case, the remedy provided by section 1053 of the *Quebec Civil Code* should be applied. As the system of contractual responsibility, the system of delictual responsibility required the fulfillment of three conditions, i.e. the prosecuted party must have committed an offence, damages must have been caused and the damages must be the consequence of the offence. The cases of misleading publicity and fraudulent artifices studied in the first part come under the traditional definition of offence.[147] However, the problem of determining and defining the damage is more complex in the present case. Indeed, in most cases of misleading advertising which does not result in a contract, personal damages to the consumers are negligible if not non-existent. In the example given here, the consumer attracted on the premises by misleading publicity could sue for his travelling expenses, loss of time and inconvenience. But all of this is negligible. The consumer would then have to prove that he was attracted on the commercial premises mainly by the misleading advertisement (consequence). This is difficult and expensive to prove especially considering the weakness of the financial stakes.

Thus, it appears that the recourse to the system of civil delictual responsibility where damages were caused further to a misleading advertisement that was not followed by a contract, is theoretically possible but inapplicable in most

cases. This most likely explains why, to our knowledge, no decision dealing with this problem can be found in Quebec jurisprudence.

Essentially, it can be seen that the system of delictual responsibility is mostly used as a complement to the system of contractual responsibility in the examples given in Part One.

The small amount of money at stake when a misleading advertisement has not resulted in a contract allows us to think that class actions are the only effective mechanism that can be a practical recourse for defrauded consumers.

CONCLUSION AND RECOMMENDATIONS

Although the *Quebec Civil Code* was not created within the context of our consumer society, it still offers a solution to most of the problems involved in the compensation of victims of misleading or fraudulent practices. A brief study of the numerous civil law decisions on the subject shows us that the civil law still provides useful solutions.

Thus, we may see that the problems caused by misleading advertising and fraud may be placed in the broader context of false representations, which may lead a party to contract as the result of an error induced by the other party. We have also noted that the concept of "fraud" is not restrictive and covers all types of representations, whether they be oral, written, published, or otherwise circulated. The civil concept of "fraud" enables us to question all types of transactions in which misled parties contracted. It is therefore believed that due to its extensive nature, the action for fraud serves the Quebec consumer very well.

It is mainly in the field of contractual recourse that the civil law of Quebec chose to provide the misled consumer with a right of action. A study of the elements which make up fraud, of the conditions under which remedy can be sought, and of the resulting sanctions, leads us to believe that the misled consumer's position could be greatly improved in the present revision of the *Civil Code*, or by the development of a new Quebec *Consumer Protection Act*.

In order to provide Quebec consumers with an adequate civil remedy against misleading advertising, we believe that five contractual aspects of our law should be modified.

The first modification that should be made concerns the types of behaviour which constitute "fraud" under the *Civil Code*. We have previously noted that the vendor's total silence or his complete abstention from giving any information on an important aspect of a transaction does not constitute fraud, since as it is presently defined, only positive behaviours may result in fraud.[148]

The second problem arises when the consumer is required to prove that he has been misled by fraudulent practice.

As we have noted, the rules of evidence have not been applied stringently, in that the consumer may use the injurious aspect of the transaction as a presumption of misrepresentation. However, we believe that the burden of proof should be diversed when the consumer can demonstrate that the seller used an artifice which *prima facie* was fraudulent. Under the provisions of the British Columbia *Trade Practice Act*, the Unfair Trade Practices Board[149] which deals with narrowly defined misleading representations requires the offending party to prove that the consumer was not in fact misled by the alleged misrepresentations.

Ratification and prescriptive delays constitute a major problem. Often, the consumer will not know what may constitute an implicit ratification of a transaction that was entered into as the result of a misleading practice. It might be appropriate to adopt a presumption of non-ratification for a period of three months from the moment of becoming aware of the misleading character of the transaction, this three-month period would also serve as a prescriptive for the action. Thus, the consumer would have three months, from the day the fraud was discovered, in which to prosecute, and would be presumed not to have ratified the contract during this period. An additional problem is created by the use during the proceeding of the products which are the object of the misleading transaction. Under the present jurisprudence, this use constitutes an implicit ratification. This is a very relevant problem, particularly when the consumer has purchased an expensive item for which he has a great need. Taking the example of a car, the consumer cannot refrain from using it and in addition incur storage expenses during the entire period while awaiting a court's decision. Nor would it be feasible for the consumer to acquire an identical item as a replacement during this waiting period. In these circumstances, it would appear that due to the possibility of ratification, the right to request an annulment of the contract or to win damages remains a theoretical right which for economic reasons is not practicable.

In this example, it should be provided that the use of the item does not constitute ratification and that if the consumer does make use of the article until the time of judgment, that the loss of value brought about by this use be deducted from the consumer's claim if it is accepted by the court.

In certain cases a problem may arise due to the relationship between the seller and a third party who made the false representations. This party may sometimes promote a product without being a party to the contract. It can be seen, that in practice, it may be difficult for the consumer to prove that there has been collusion between the parties or that the seller was aware of the false representations in cases where the advertiser is not the seller's agent or representative. A presumption should be established[150] to the effect that the seller is bound by the representations made by third parties when he should have known of the existence of these representations.

The final problem at the contractual level is the punishment of fraud. We have seen that the requirements as to the nature of the fraud, or the apparent restriction of sanctions to outright annulment of the contract, have not prevented our courts from granting damages or price reductions in cases of fraud, whether they were "principal" or "incidental". However, this situation should be clarified. In cases where false representations dealt with a principal consideration of the contract, the misled consumer should be allowed to resort to the full range of recourses. This would include an action in nullity, for damages, or for reduction in price. In cases where the fraud was only incidental, the victim should be permitted to claim damages so as to reduce his cost, since he would normally have agreed to the transaction at the lower price.

A study of the delictual aspect shows us that the general nature of the recourse provided for by section 1053 of the *Civil Code* enables us to avoid most of the obstacles encountered on the contractual level. While the problems of substantive law may appear to be of lesser importance here, the minimal quantum of damages involved in misleading advertising suits outside the contractual framework, lead us to believe that only class actions may provide an effective remedy for consumers. It may be felt that a right may only be valued in terms of its accessibility.

FOOTNOTES

INTRODUCTION

1. *Civil Code* of the Province of Quebec.

2. Chapter IV - *Private law redress for Unfair Trade Practice;* pp. 243-244.

3. *Trade Practice Act,* SBC 1974; S. 96.

4. *Unfair Trade Practice Act,* SA 1975; (Bill 21).

5. *Business Practice Act,* SO 1974; c. 131.

PART ONE: CONTRACTUAL REMEDIES

I - NATURE AND SCOPE OF THE NOTION OF FRAUD

6. In Quebec law: Trudel, G., *Traité de driot civil du Québec,* Vol. 7; *Des contrats,* Wilson et Lafleur, Montreal, 1946, p. 177; Mignault, P.B., *Droit civil canadien,* Vol. 5, Montreal 1901, p. 211; Baudoin, J.L., *Les obligations, Traité élémentaire de droit civil,* Les Presses de l'Université de Montréal, 1970, p. 77, *et seq;* Tancelin, M., *Théorie du droit des obligations,* Les Presses de l'Université Laval, 1975, p. 59; Langelier, F., *Cours de droit civil,* Montreal, Wilson et Lafleur, 1907, Vol. 3, p. 993; Perreault, A., *Traité de droit commercial,* Montreal, A. Lévesque, 1936, Vol. 2, p. 440, *et seq;* Routhier, A., *Des causes de nullité des contrats,* 1942, p. 67.

   In French law: Ripert, G. and Boulanger, J., *"Traité de droit civil",* Paris, Librairie générale de droit et de jurisprudence, 1957, Vol. 2, No. 178, p. 75, *et seq;* Marty, G. and Raymond, P., *Droit civil,* Paris, Sirey, 1962, Vol. 2, p. 124, *et seq;* Carbonnier, J., *Droit civil,* Paris, Presses universitaires de France, 1957.

7. Arts 991 and 993 of the Quebec *Civil Code:*
   Art 991: "Error, fraud, violence or fear, and lesion are causes of nullity in contracts; subject

to the limitations and rules contained in this code".

Art 993: "Fraud is a cause of nullity when the artifices practised by one or with his knowledge are such that the other party would not have contracted without them".

8. *Ménard v Roy*, (1922) 32 KB 350; *Gagnon v Larouche*, (1929) 44 KB 500; *Grégoire v Bechard*, (1930) 49 KB 27.

9. *Frost v Wood*, (1905) 14 KB 320; *Lepage v Lamontagne Commercial Equipment Ltd* [1968] CS 141.

10. *Quirion v Chantigny*, [1957] CS 282; *Maguin v Suto*, (1958) CS 480.

11. According to Trudel, this absence of restrictions may be explained by the fact that fraud can be the basis of a petition to rescind for mistake in cases not coming under Art 992 of the *Civil Code*. See Trudel, *op.cit.*, p. 178.

12. *Maltais v Gilbert*, [1959] CS 440.

13. *Forget v Gohier*, [1945] KB 437.

14. *Kirbeman v Metro Universal Development Corp*, [1965] CS 510.

15. *Deschênes v Express Tours Ltée* (unreported), Provincial Court, Quebec City, 89-121.

16. *Maltais v Gilbert*, [1959] CS 440.

17. *Manseau v Colette*, [1955] CS 2.

18. *Lussier v Courvoisier Chimney Contractors Inc*, [1962] CS 561.

19. *Lortie v Bouchard*, [1950] KB 581; [1952] 1 SCR 508; *Jardine v Allen*, [1952] CS 126.

20. *Deauville Estate Ltd v Tabah*, [1964] QB 53.

21. *Latour v Page et fils Ltée* [1956] CS 153.

22. *Lepage v Lamontagne Commercial Equipment Ltd*, [1968] CS 141.

23. *Blacks v Salomon* (unreported judgment), Provincial Court, #02-031-2300-73.

24. *Delisle v Clavet*, [1972] CA 897.

25. Case law provides many examples of rescission of a contract of sale of a business on account of misrepresentation: gross exaggeration in the estimate of profits of a bus route, *Lortie v Bouchard*, [1950] KB 581; [1952] 1 SCR 508; misleading representations as to the turnover, number of employees and profits of a grocery store, *Rivard v Racine*, [1950] CS 427; falsification of the list of clients of an insurance broker, *Manseau v Colette*, [1955] CS 2; misrepresentation as to the profits of a restaurant, *Silver v Shuster*, [1954] CS 206; of a cinema, *Twentieth Century Fox Ltd v Roxy Amusements*, [1960] QB 546; of a garage, *Tremblay v Les Petroles Inc*, [1961] QB 856; [1963] SCR 120; or of a café, *Brisson v Lepage*, [1969] QB 657.

26. *Benoît v Metivier*, [1948] CS 53; *Jardine v Allen*, [1952] CS 126; *Lortie v Bouchard*, [1950] KB 581; [1952] 1 SCR 508; *Cinq-mars v Beanhouse* (unreported), 1975, Provincial Court, Montreal, 500-32-610743-74; *Dubé v Halle* (unreported), Provincial Court, Quebec City, 106-762, May 6, 1974; *Levert v Brouillard Automobile* (1962) (unreported), Provincial Court, Saint-Francois, 450-02-001375-74; *Comtois v Bellehumeur Automobile Ltée* S (unreported), Provincial Court, Hull, 73-279.

27. *Girard v J D Chevrolet Oldsmobile Ltd*, [1973] CS 263; *F Sarazin Automobile v Pilon* (unreported), Provincial Court, Terrebonne, A-2418-5.

28. *Dagenais v Les Agences Hyoto Toyota Ltée* (unreported), Provincial Court, 73-1899; *Deschanps v Longueuil Automobile Ltée* (unreported), Provincial Court

7315589; *Deschamps v Voger Automobile Inc.* (unreported), Provincial Court, Rivière-du-Loup, 730753, January 30, 1974; *Gosselin v Alix Automobile Inc.* (unreported), Provincial Court, 32-000-260-74; *Leblanc v Garage Blanchette* (unreported), Provincial Court 505-32000167-743. See earlier decision to the contrary: *Merit Motors v L'Archevêque*, (1939) 67 KB 295.

29. *Gagné v Girard* (unreported), Provincial Court, Saint-François, 450-02-07400889.

30. Sale of a building represented as having been built entirely of stone, *Pagnuelle v Choquette*, (1904) 34 RSC 102; rental of a building represented as being fireproof, when several fires had broken out there, *Kirkman v Metro Universal Development Corp*, [1965] CS 510.

31. *Maltais v Gilbert*, [1959] CS 440, sale of a truck with the promise that a relative of the seller would give work to the buyer.

32. *Verdoni v Vanguy Ltée* (unreported), Provincial Court, Montreal, 348-145, February 1, 1972.

33. *Deauville Estate Ltd. v Tabah*, [1964] QB 53.

34. A travel agency that grossly exaggerates the quality and luxuriousness of the ship on which its clients are to sail may be ordered to pay damages or to rescind the contract: *Deschênes v Express Tours Ltée* (unreported), Provincial Court, Quebec City, 89-121. The same holds true for a seller who has wrongfully exaggerated the quality and durability of articles to be delivered to the consumer: *Economy Ware Kitchen Specialty Ltd. v Abdela* (unreported), Provincial Court, Montreal, 400-168.

35. *Lussier v Courvoisier Chimney Contractors Inc*, [1962] CS 561.

36. *Rawleigh v Lumoulin*, (1925) 39 KB 241; [1926] SCR 551.

37. For example, it has been held that the plaintiff may claim misrepresentation on the part of a seller who made statements to the effect that an automobile was in good condition and would run up to 150,000 miles, despite the fact that the defendant wrongly believed that the vehicle was in good condition: *Levert v Brouillard Automobile Ltée* (1962) (unreported), Provincial Court, Saint-François, 450-02-001375-74.

38. *Comtois v Bellehumeur Automobile Ltée* (unreported), Provincial Court, Hull, 93-279.

39. This fraudulent practice [TRANS] "consists of letting the contracting party believe a thing in error, without undeceiving it, or of refraining from disclosing a fact to it that would change its mind": Baudouin, J.L., *op.cit.*, p. *(sic)*.

40. Trudel, *op.cit.*, p. 183; Baudouin, *op.cit.*, p. *(sic)*.

41. Trudel, *op.cit.*, p. 183.

42. Baudouin, J.L., *op.cit.*, p. *(sic)*; see also: *Letellier v Lafortune* (1904) 26 CS 260; *Gingras v Larose* (1939) 77 CS 394; *Gosselin Ltée v Péloquin* (1957) SCR 15; (1954) OB 674.

43. *Forget v Gohier*, [1945] KB 437; *Métivier v Marceau*, [1954] QB 327; *Théoret v Toussignant*, [1963] CS 296. See special application of the principle in *Ruel v St-Pierre*, [1970] CA 292.

44. *Métivier v Marceau*, [1954] QB 327.

45. *Ethier v Rivard* (unreported), Provincial Court, 1974, Montreal, 02-039972-73, in which the Court stated that the seller was bound to reveal the price he paid for a vehicle to the buyer.

46. Baudouin, J.L., *op.cit.*, p. 80; Tancelin, *op.cit.*, p. 60.

47. Mignault, *op.cit.*, p. 223.

48. Tancelin, *op.cit.*, p. 60.

49. *Lortie v Bouchard*, [1952] SCR 508, Taschereau, J., at 517.

50. For example: *Dominion Provisioners Ltd v Gaucheault*, [1963] QB 98.

51. See in this regard *Rivard v Racine*, [1950] CS 427; *Tremblay v Les Petroles Inc.*, [1961] QB 856; [1963] SCR 120; *Deschênes v Express Tours Ltée* (unreported), Provincial Court, Quebec City, 90-121.

52. *Grant v Her Majesty the Queen*, (1892) 20 SCR 297; *Montreal Investment and Realty Co v Sarault*, (1917-18) 57 SCR 464; 24 BR 249; *Breslow v Carleton HOuse Ltd.*, [1962] QB 266; *Pouliot v Gauthier*, [1970] CA 409.

53. *Pouliot v Gauthier*, [1970] CA 409.

54. *Tremblay v Les Petroles Inc.*, [1961] QB 856; [1963] SCR 120.

55. *Prefontaine v Smythe*, [1952] CS 344; *Tremblay v Charest*, [1963] CS 587.

56. *Bedard v Dery* (unreported), Provincial Court, Quebec City, 280-02-001371-74.

57. *Faubert v Poirier*, [1956] QB 55; [1955] SCR 459.

58. *Rawleigh v Dumoulin*, (1925) 39 KB 241; [1926] SCR 551.

59. *Pouliot v Gauthier*, [1970] CA 409.

60. *Paquette v Boisvert*, [1958] QB 150; see also: *Deauville Estate Ltd. v Tabah*, [1964] QB 53; *Latour v Pagé et Fils Ltée*, [1956] SC 153.

61. In this respect see the judgment of Bissonnette J. in: *Deauville Estate Ltd. v Tabah*, [1964] QB 53, at 56.

62. *Consumer Protection Act* (SQ 1971, c. 74).

63. *Ibid.*, s. 60.

64. *Ibid.*, s. 62.

65. *Longpré v St-Jacques Automobile Ltée*, [1961] CS 265; *Bombardier v Auclair* (unreported), Provincial Court, 1974, Bedford, G 12412; *Comtois v Bellehumeur Automobile Ltée* (unreported), Provincial Court, Hull, 93-279.

66. *Forget v Gohier*, [1945] KB 437; *Métivier v Marceau*, [1954] QB 327.

II - CONDITIONS FOR THE EXERCISE OF A REMEDY IN DAMAGES OR FOR RESCISSION ON GROUNDS OF FRAUD

67. Art.2202 of the *Civil Code* reads: "Good faith is always presumed. He who alleges bad faith must prove it."

68. *Maltais v Gilbert*, [1959] CS 440; *Tourangeau v Leclerc*, [1963] QB 760; *Ruel v St-Pierre*, [1970] CA 292.

69. *Roy v Morin*, [1949] KB 570; *Cie J.A. Gosselin Ltée v Péloquin*, [1954] QB 674; [1957] SCR 15; *Faucher v Pilon*, [1953] QB 583; *Lessard v Maillé*, [1957] QB 613; *Luicci v Bouchard*, [1961] QB 809; *Dominion Provisioners Ltd. v Gaudreault*, [1963] QB 98; *Asbestos Eastern Transport Inc. v Maurice*, [1968] QB 928; [1971] SCR 90; *Ravary Transport Inc. v Chrysler Corporation of America*, [1968] QB 445.

70. Consumer alleging misrepresentation at the time of the purchase of a freezer: *Dominion Provisioners Ltd. v Gaudreault*, [1963] QB 98; *Faucher v Pilon*, [1953] QB 583; *Lessard v Maillé*, [1957] QB 613.

71. Art.1234 of the Quebec *Civil Code*.

72. See Mignault J's comments in *Rawleigh v Dumoulin*, [1926] SCR 551, at 554.

73. *Louis and Genet Enterprise Inc. v Dubé*, [1962] CS 335;

Savard v Roll Up Awnings Ltd., [1964] QB 344; *Haroon v Plouffe*, (unreported), Provincial Court, Montreal, 1974, # 500-32-004030-74.

74. Baudoin, J.L., *op.cit.*, p. 81; Dorion, *La preuve par témoins*, Montreal, 1894, n. 45, p. 50; Langelier, C., *De la preuve*, Montreal 1895, n. 592, p. 250; Mignault, P.B., *op.cit.*, p. 85; Tancelin, M.A., *op.cit.*, p. 60; Trudel, C., *op.cit.*, p. 187.

75. *Pagnuelo v Choquette*, (1904) 34 SCR 120, p. 107; *Rawleigh v Dumoulin*, (1925) 34 KB 241; [1926] SCR 551, p. 554; *Dassylva v Dassylva*, [1951] KB 608; *Latour v pagé et Fils Ltée*, [1956] CS 153; *Couillard v Vallières*, [1962] QB 93; *Richer v Segal*, [1973] CA 36; *Comtois v Bellehumeur Automobile Ltée* (unreported), Provincial Court, Hull, 1974, 93-279.

76. Baudoin, J.L., *op.cit.*, p. 81; Tancelin, M.A., *op.cit.*, p. 60.

77. *Maillot v Simard*, [1971] CS 686; *Mercier v Saucier*, [1960] CS 305.

78. *Faubert v Poirier*, [1956] QB 551; [1959] SCR 459; *Pucholska v Masse*, [1958] CS 197; *Legault v Thellend*, [1964] QB 41; *Imperial Oil Ltd. v Tanguay*, [1971] CS 680; *Giguère v Bourque*, [1973] CA 663.

79. "Although error and fraud can be proved by testimony, the courts out of prudence require that the testimony of the person relying on one of these arguments be corroborated so that the evidence is conclusive" [TRANS]: *Giguère v Bourque*, [1973] CA 663, at 666.

80. *Tremblay v Les pétroles Inc.*, [1961] QB 856, at 863.

81. *Quirion v Chantigny*, [1957] CS 282; *Faubert v Poirier*, [1956] QB 551; [1959] SCR 459; *Tremblay v Les Pétroles Inc.*, [1961] QB 865; *Lakefields Construction and Development Inc. v Terrault* (unreported),

Provincial Court, Montreal, 280-758, 1970; *Ethier v Rivard* (unreported), Provincial Court, Montreal, 02-039972-73, 1974; *Contra: Veni Plex Corp. of America v Connor Venetian Blinds Ltd.*, [1956] CS 250.

82. Trudel, G., *op.cit.*, p. 155; *Riendeau v Bernard*, (1901) 31 SCR 234; *Denis v Montreal Investment and Realty Co.*, (1914) 54 CS 116; *Montreal Investment and Realty Co. v Sarault*, (1917-18) 57 SCR 464.

83. *Nova Scotia Construction Co. Ltd. v Quebec Streams Commission*, [1956] QB 551; [1959] SCR 459; *Mercier v Saucier*, [1960] CS 305.

84. Thus it was held that a purchaser who waits three months after learning of the misrepresentation before making a complaint will be deemed to have ratified the purchase: *Breslow v Carleton House Ltd.*, [1962] QB 266; similarly in the case of one who waits a year before making a complaint: *Imperial Oil Ltd., v Tanguay*, [1971] CS 68; or fifteen months after the purchase of a vehicle: *Latour v Pagé et Fils Ltée*, [1956] CS 153; *Cie J.A. Gosselin Ltée v Peloquin*, [1957] SCR 15; [1954] QB 674.

85. It has been held that a consumer who alleges that he was misled at the time of the contract but does not complain of this fact until several months later, when he is sued for payment, must be deemed to have ratified the contract: *Lambert v lévis Auto Inc.*, [1956] QB 257; [1957] SCR 621; *Delisle v Clavet*, [1972] CA 897; *Pouliot v Gauthier*, [1970] CA 409; *Boisseau v Paré* (unreported), Provincial Court, Montreal, 1974, 02-004047-74.

86. *Ravary Transport Inc. v Chrysler Corp. of America Ltd.*, [1968] QB 445; *Girard v J.D. Chevrolet Oldsmobile Ltée*, [1973] CS 263; *Brisson v Lepage*, [1969] QB 657.

87. *Bellerose v Bouvier*, [1956] QB 175; *Beaurivage v Chabot*, [1957] CS 81.

88. *Kirtue v Bouchard*, [1950] KB 81; [1952] 1 SCR 508; *Silver b Shuster*, [1954] CS 206; *Manseau v Collette*,

[1955] CS 2; *Tremblay v Les Pétroles Inc.*, [1961] QB 856; [1963] SCR 120; *Brisson v Lepage*, [1969] QB 675.

89. Baudoin, J.L., *op.cit.*, p. 80; Mignault, P.B., *op.cit.*, p. 222; Tancelin, M., *op.cit.*, p. 180.

90. Mignault, P.B., *op.cit.*, p. 222.

91. Baudoin, J.L., *op.cit.*, p. 80; Mignault, P.B., *op.cit.*, p. 223.

92. *Buron v Vomberge*, [1958] QB 263; *Tremblay v Les Pétroles Inc.*, [1961] QB 856; [1963] SCR 120; *Tourangeau v Leclerc*, [1963] QB 760; *Kirkman v Metro Universal Development Corp.*, [1965] CS 510.

93. *Manseau v Colette*, [1955] CS 2; *Bellerose v Bouvier*, [1955] QB 175; *Mercier v Saucier*, [1960] CS 305; *Bellemare v Dionne*, [1961] QB 524; *Girard v J.D. Chevrolet Oldsmobile Ltée*, [1973] CS 263; *Contra: Pagnuelo v Choquette*, [1904] 34 SCR 102.

94. Baudoin, J.L., *op.cit.*, p. 81; Trudel, G., *op.cit.*, p. 184.

95. Mignault, P.B., *op.cit.*, p. 224.

96. *Canadian Finance Corp. v Verdoni*, (unreported), Provincial Court, Montreal, 348-145, February 3, 1972.

97. *Boily v Carroussel Ford Sales Ltd.*, (unreported) Provincial Court, Montreal, 02-041479-73, May 30, 1974.

98. *Paquette v Boisvert*, [1958] QB 150; *Breslow v Carleton House Ltd.*, [1962] QB 266; (Superior Court decision reported in CA); *Tourangeau v Leclerc*, [1963] QB 760; (Superior Court decision reported in CA); *Brisson v Lepage*, [1969] QB 657.

99. *Boulanger v Morgan Realties Ltd.*, [1958] QB 78; *Paquette v Boisvert.*

100. *Rawleigh v Dumoulin*, [1925] QB 241; [1926] SCR 551.

101. Baudoin, J.L., *op.cit.*, p. 80-81; Trudel, G., *op.cit.*, p. 185.

102. *Lortie v Bouchard*, [1952] 1 SCR 508; *Silver v Shuster*, [1954] SC 206.

103. *Beauvirage v Chabot*, [1957] SC 81.

104. In some instances, the application of this rule is the same as the non-ratification requirement: *Tourangeau v Leclerc*, [1963] QB 760.

105. *Pagnuelo v Choquette*, [1904] 34 SCR 102 in which the Supreme Court overrules inferior courts, especially on the subject of restoration; *Lortie v Bouchard*, [1950] QB 581; [1952] 1 SCR 508; *Silver v Shuster*, [1954] SC 206; *Lemire v Pelchat*, [1957] SCR 823; *Brisson v Lepage*, [1969] QB 675.

106. *Pagnuelo v Choquette*, [1904] 34 SCR 102; pp. 112-113.

III - THE SANCTIONS FOR FRAUD

107. Section 993, *Civil Code*.

108. Section 2258, *Civil Code:* "The action in restitution of minors for lesion, the action in rectification of tutor's accounts and that in rescission of contracts for error, fraud, violence or fear, are prescribed by ten years.

This time runs in the case of violence or fear from the day it ceased; and in the case of error or fraud from the day it was discovered." *Cf. Brisson v Lepage*, [1969] QB 657.

109. *Rivard v Racine*, [1950] SC 427; *Lortie v Bouchard*, [1950] QB 581; [1952] 1 SCR 508; *Jardain v Allen*, [1952] SC 126; *Métivier v Marceau*, [1954] QB 327; *Paquette v Boisvet*, [1958] QB 150; *Buron v Vomberge*, [1958] QB 263; *Tremblay v Les Pétroles Inc.*, [1961] QB 856; [1963] SCR 120; *Kirkman v Metro Universal Development Corp.*, [1965] SC 510; *Eklove and Star Inc. v Lesa Realties Ltd.*, [1968] QB 646; *Maillot*

v Simard, [1971] SC 686; *Turgeon v Giroux*, [1972] CA 626.

110. Trudel, G., *op.cit.*, p. 190.

111. *Pagnuelo v Choquette*, [1904] 34 SCR 102.

112. *Mr. Justice Girouard in Pagnuelo v Choquette*, [1904] 34 SCR 102; p. 111.

113. *Legault v Légaré Auto Supply*, [1944] 30 RLns 155; *Lachance v Ducharme*, [1930] 48 QB 215; *Morel v Rousseau*, [1933] 54 QB 452; *Nova Scotia Construction Co. Ltd. v Quebec Streams Commission*, [1933] RCS 220; *Silver v Shuster*, [1954] SC 206.

114. *Silver v Shuster*, [1954] SC 206; p. 209.

115. *Manseau v Colette*, [1955] SC 2; *Bellerose v Bouvier*, [1955] QB 175.

116. *Manseau v Colette*, [1955] SC 2; pp. 6-7.

117. *Benoît v Métivier*, [1948] SC 53; *Cazes v Cayer*, [1953] QB 574; *Longpré v St-Jacques Automobiles Ltd.*, [1961] SC 265; *Delisle v Clavet*, [1972] SC 897; *Girard v J.D. Chevrolet Oldsmobile*, [1973] SC 263; *Cinq-Mars v Beanhouse*, [unreported], Provincial Court, Montreal, # 500-32-010743-74.

118. *Girard v J.D. Chevrolet Oldsmobile*, [1973] SC 263; p. 264.

119. Implicit in: *Lepage v Lamontagne Commercial Equipment Ltd.*, [1968] SC 141.

120. *Economy Ware Kitchen Speciality Ltd. v Abdela*, (unreported), Provincial Court, Montreal, 400-168.

121. *Boudrias v Delisle Auto Ltd.*, (unreported), Provincial Court, Montreal, # 32-006807-73; *Dagenais v Les Agences Kyoto Toyota Ltd.*, Provincial Court, # 73-1897; *Deschamps v Longueuil Automobile Ltd.*, (unreported), Provincial Court, Montreal, # 73-1589; *Deschamps v Voyer Automobile Inc.*, (unreported),

Provincial Court, Rivière-du-Loup, # 730753, January 30, 1974; *Gosselin v Alix Automobile Inc.*, (unreported), Provincial Court, # 32-00260-74; *Leblanc v Garage Blanchette*, (unreported), Provincial Court, # 505-32000167-743.

122. Thus, we also believe that the consistency and the value of decisions granting a recourse for price reduction for latent defects in the thing sold in a case of bad designation of lots sold should be questioned, *Couillard v Vallières*, [1962] QB 93; or when the true identity of the owners of the thing sold has been hidden from the buyer; *Boisseau v Paré*, (unreported), Provincial Court, Montreal 1974, # 02-004047-74; or in cases of false representations about the mileage of a car that has been sold: *Ethier v Rivard*, (unreported), Provincial Court, Montreal, # 02-039972-73. In such instances, the matter should not be seen as one pertaining to defects of the thing put up for sale in the meaning of section 1522 *Civil Code*, but rather to the nature of representations made about goods that were otherwise in a good state.

123. *Pinkus Construction Inc. v McRobert*, [1968] QB 516; *Bédard v Déry*, (unreported), Provincial Court, Quebec 1974, # 200-02-001371-74.

124. Section 1053, *Civil Code:* "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill".

125. Baudoin, J.L., *op.cit.*, p. 83; Mignault, P.B., *op.cit.*, p. 223; Trancelin, M., *op.cit.*, p. 62; Trudel, G., *op.cit.*, p. 189.

126. Trudel, G., *op.cit.*, pp. 189-190.

127. Mignault, P.B., *op.cit.*, p. 223.

128. Baudoin, J.L., *op.cit.*, p. 83; Trancelin, M., *op.cit.*, p. 62.

129. Crépeau, P.A., *Régimes contractuel et délictuel de la*

responsabilité civile en droit québécois, [1962] 22 R. du B. 501. See also: Baudoin, J.L., *La responsabilité civile délictuelle*, Presses de l'Université de Montréal, 1972, p. 15, nos. 21 to 23; Masse, C., *Cours de responsabilité civile délictuelle*, Roneo, Groupe de recherche en jurimétrie (Jurimetrics research group), University of Montreal, 1976, p. 40; Nadeau, A. and R., *Traité pratique de la responsabilité civile délictuelle*, Wilson and Lafleur, Montreal 1971, p. 28, no. 44.

130. There is also a practical interest in distinguishing between the two recourses open in matters of fraud when it is a question, among others, of assessing the extent of the damages. The delictual action results in compensation for all damages whereas contractual action results only in compensation for foreseeable damages at the moment the contract was made (1074 C.C.). This distinction was applied to fraud in *Boutin v Paré*, [1959] QB 459; p. 464. See also *Ruel v St-Pierre*, [1970] CA 292. The distinction between the two possible recourses may also be most important as regards prescription, the prescription for delictual action being only of two years. (2261, al, 2, C. C.)

131. Crépeau, P.A., *op.cit.*, p. 519.

132. See the study made by P.A. Crépeau on this question, *op.cit.*,

133. Nadeau, A. and R., *op.cit.*, p. 28.

134. The most important decision on this question was rendered by the Supreme Court of Canada in *Ross v Dunstall* [1922] 62 SCR 393.

135. *Notre-Dame Hospital v Patry*, [1962] CA 559; *Létourneau v Jolicoeur*, [1973] RLNS 1; *Gagnon v Rossignol*, [1973] RLNS 252; *Canadian Youth Hostels Association v Bennet*, [1973] PR 352; *Canadian Home Assurance Company v Citroen Ltd.*, [1974] CS 4.

136. *Piuze v Pépin*, [1954] CS 99; *Pinkus Construction Inc. v McRobert*, [1968] CS 516; *Blades v Salomon*,

(unreported), Provincial Court, Montreal, # 02-031-230-73. This latter case deals with a situation in which the odometer of a car that was sold was tempered with. The Provincial Court granted damages for the amount of $200 for loss of value of the vehicle in connection with the representations and $250 for necessary repairs caused by excessive wear of the vehicle.

138. *Bellerose v Bouvier*, [1955] QB 175; *Bellemare v Dionne*, [1961] QB 524.

139. *Paquette v Boisvert*, [1958] QB 150; *Brisson v Lepage*, [1969] QB 657; *Bombardier v Auclair*, (unreported), [1974], Provincial Court, Bedford, G-12412.

140. *Boutin v Paré*, [1959] QB 459.

IV - DAMAGE SUITS CONCERNING MISLEADING ADVERTISEMENT

141. Baudoin, J.L., *op.cit.*, p. 90; no. 151.

142. Baudoin, J.L., *op.cit.*, p. 91; no. 152.

143. On this question, see: Demogue, E., "De la lésion dans les contrats" (1937-38) 16 R. de D. 5; Demantes, E., "Observations sur la théorie de la lésion dans les contrats" in, *Etudes de droit civil à la mémoire d'Henri Capitant*, Paris, Dalloz, 1939.

144. Its the case of responsibility transaction made within 15 days after the offence or the quasi-offence (section 1056 b. *Civil Code*) and of money loans (1040, *Civil Code*).

145. Section 118: "Every consumer whose inexperience has been exploited by a merchant may demand the nullity of the contract or a reduction in his obligations if they are greatly disproportionate to those of the merchant". *Consumer Protection Act*, Chapter 74, S.Q. 1971.

146. Section 1 (2) e), *Consumer Protection Act*, Chapter 74, S.Q. 1971.

PART TWO: DELICTUAL REMEDIES

147. Offence: "Violation of the legal duty of not being the cause of illegitimate prejudice to others by having a conduct contrary to that of a normally prudent and diligent man in the same circumstances as those in which the author of the prejudice was at the time he made a reproachable act or omitted to act when he should have." Baudoin, J.L., *La responsabilité civile délictuelle, op. cit.*, p. 54.

CONCLUSION AND RECOMMENDATIONS

148. In its report on obligations, the Civil Code Revision Office proposes to in part solve this problem by adopting the following principle "ce dol peut resulter du silence au d'une reticence". (article 33) Civil Code Revision Office, Committee on the law of obligations, Report on Obligations, Montreal 175, p. 70.

149. *Trade Practice Act*, S.B.C. 1974 ch. 96. See also *Unfair Trade Practice Act*, S.A. 1975 (bill 21), *Business Practice Act*, S.O., 1974, ch. 131.

150. This is the form used by the Civil Code Revision Office in its proposals. "Le dol d'un tiens est réputé celui du contractont qui a lu on aurait dû en avoir connaissance". (article 32) Civil Code Revision Office, *Report on obligations, op. cit.*, p. 68.